153 U.S. 525

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1040.

SUSAN LUXTON, PLAINTIFF IN ERROR,

vs.

THE NORTH RIVER BRIDGE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 12, 1893.

(15,424.)

(15,424.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1040.

SUSAN LUXTON, PLAINTIFF IN ERROR,

vs.

THE NORTH RIVER BRIDGE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

INDEX.

	Original.	Print.
Bond	1	1
Writ of error	3	2
Citation	4	2
Assignment of errors	5	3
Petition for appointment of commissioners	7	4
Description of land	15	8
Map of land	17	8
Order appointing time for hearing	18	9
Order appointing commissioners	20	9
Oath of commissioners	26	12
Order of commissioners as to time of meeting	27	12
Notice of meeting of commissioners	28	13
Notice of meeting of commissioners	29	14
Award and report of commissioners	30	14
Description of lands	33	15
Map (not set out—see side page 17)	34	16
Notice of application to confirm award and report of commissioners	35	16
Order confirming award and report of commissioners	36	17
Waiver of appeal from award of commissioners	40	19
Clerk's certificate	41	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 31, 1893.

1 Supreme Court of the United States.

SUSAN LUXTON, Plaintiff in Error,
ag'st
THE NORTH RIVER BRIDGE COMPANY, Defendant in Error. } Bond.

Know all men by these presents that we, Susan Luxton and George J. Luxton, both of Jersey City, Hudson county, New Jersey, are held and firmly bound unto the North River Bridge Company in the sum of five hundred dollars, to be paid to the said company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the twenty-eighth day of August, eighteen hundred and ninety-three.

Whereas the above-named Susan Luxton has taken a writ of error to the United States Supreme Court to reverse the judgment rendered in the matter of the application of the North River Bridge Company to condemn lands of Susan Luxton by the circuit court of the United States for the district of New Jersey:

Now, therefore, the condition of this obligation is such that if the above-named Susan Luxton shall prosecute her writ and answer all costs if she shall fail to make good her plea, then this
2 obligation shall be void; otherwise to remain in full force and virtue.

SUSAN LUXTON. [L. S.]
G. J. LUXTON. [L. S.]

Signed, sealed, and delivered in the presence of—
WILLIAM E. SKINNER.

DISTRICT OF NEW JERSEY, *ss*:

George J. Luxton, of full age, being duly sworn, on his oath says that he is the surety on the foregoing bond; that he is a resident of the county of Hudson and an owner of real estate therein the value of which is not less than one thousand dollars, and that he is worth more than double the amount of the penal sum in the foregoing bond mentioned over and above all his just debts and liabilities and over and above all incumbrances on his said lands.

G. J. LUXTON.

Subscribed and sworn to this 13th day of September, A. D. 1893, at Hoboken, N. J., before me—

WILLIAM E. SKINNER,
Commissioner of the Circuit Court of the United States in and for the District of New Jersey.

Approved Sept. 20th, 1893.
EDW. T. GREEN, *J.*
1—1040

Endorsed: United States Supreme Court. Susan Luxton, pl'ff in error, *vs.* The North River Bridge Company, def't in error. Bond. Gilbert Collins, att'y. Filed Sep. 20, 1893.

3 UNITED STATES OF AMERICA, *ss:*

The Seal of the U. S. Circuit Court, Dist. of New Jersey.

The President of the United States of America to the judges of the circuit court of the United States for the district of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, in the matter of the application of the North River Bridge Company to condemn lands of Susan Luxton, situate in the city of Hoboken, in the county of Hudson and State of New Jersey, a manifest error has happened, to the great damage of the said Susan Luxton, as by her complaint appears, we, being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the — day of October next, in the said Supreme Court to be then and there held, that, by the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, the twentieth day of September, in the year of our Lord one thousand eight hundred and ninety-three.

S. D. OLIPHANT,
Clerk of the Circuit Court of the United States for the District of New Jersey.

[Endorsed:] United States Supreme Court. Susan Luxton, pl'ff in error, *vs.* The North River Bridge Company. Writ of error. Gilbert Collins, att'y. Allowed September 20th, 1893. Edw. T. Green, J. Filed Sep. 20, 1893. S. D. Oliphant, clerk.

4 UNITED STATES OF AMERICA, *ss:*

To the North River Bridge Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the nineteenth day of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of New Jersey, wherein Susan Luxton is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward T. Green, judge of the district

court of the United States for the district of New Jersey and *ex officio* a judge of the circuit court of the United States for said district, in the third circuit, this twentieth day of September, in the year of our Lord one thousand eight hundred and ninety-three.

EDW. T. GREEN, *J.*

Due service admitted this 21st day of September, A. D. 1893.

BEDLE, McGEE & BEDLE,
Attorneys of North River Bridge Company.

[Endorsed:] United States Supreme Court. Susan Luxton, pl'ff in error, *vs.* The North River Bridge Company, def't in error. Citation. Gilbert Collins, att'y. Oct. 5, '93.

5 United States Supreme Court.

SUSAN LUXTON, Plaintiff in Error, *vs.* THE NORTH RIVER BRIDGE COMPANY, Defendant in Error.	On Writ of Error to United States Circuit Court.

Assignments of Error.

Susan Luxton, by Gilbert Collins, her attorney, comes and says that in the record and proceedings aforesaid and in the giving of judgment there is manifest error in this:

First. That in and by said judgment it was ordered and adjudged that commissioners should be appointed, and such commissioners by said judgment were appointed, to examine and appraise certain lands of Susan Luxton required and necessary to be taken by the North River Bridge Company and to assess the damages to be sustained by her in consequence of the taking and occupancy thereof.

Second. That said judgment was given in favor of the North River Bridge Company, granting the prayer of its petition against Susan Luxton, whereas by law said judgment ought to have been given for Susan Luxton against the North River Bridge Company, and the prayer of said petition should have been denied.

Third. That it was ordered that the report be confirmed.

Fourth. That it was adjudged that the defendant in error on tender may take possession.

Fifth. That by said judgment it was adjudged that the
6 power of eminent domain had been conferred upon the North River Bridge Company to take the land of Susan Luxton in the city of Hoboken, of the act of Congress approved July 11, 1890 in said judgment cited, whereas it should have been adjudged that no power to take said lands was conferred by said act or could be conferred by Congress, and the appointment of commissioners should have been denied.

And said Susan Luxton prays that the judgment aforesaid, for the errors aforesaid and for divers other errors in said record and proceedings, may be reversed and annulled, and that she may be re-

stored to all things which she has lost by occasion of said judgment.

GILBERT COLLINS,
Attorney for Plaintiff in Error.

Endorsed: United States Supreme Court. On writ of error, &c. Susan Luxton, pl'ff in error, *vs.* The North River Bridge Company. Assignment of error. Gilbert Collins, att'y. Filed Sep. 20, 1893.

7 To the judges of the circuit court of the United States for the third circuit in the district of New Jersey:

The North River Bridge Company, by this its petition and application, respectfully shows to your honors:

1. That your petitioner is a corporation duly organized under the provisions of an act of Congress of the United States entitled "An act to incorporate the North River Bridge Company and to authorize the construction of a bridge and approaches at New York city across the Hudson river, to regulate commerce in and over such bridge between the States of New York and New Jersey, and to establish such bridge a military and post road," which act was approved by the President July 11, 1890, and is published as chapter 669 in the statutes of the United States of America, passed at the first session of the Fifty-first Congress, page 268–271, and to which reference is made for the full particulars thereof.

2. That such organization was made under the said act of Congress according to the provisions thereof and was empowered therein "to locate, build, maintain, equip, and operate a bridge, proper approaches thereto, and terminals, appurtenances, and works connected therewith across the Hudson river in and between the city of New York, in the State of New York, and the State of New Jersey, and to lay tracks thereon for the connection of the railroads on either side of said river in order to facilitate interstate commerce in the transportation of persons and property and for vehicle,

8 pedestrian, postal, military, and other purposes: Provided that said bridge shall have not less than six railroad tracks, with a capacity for four additional tracks for future enlargement, and shall be constructed with a single span over the entire river between the towers located between the shore and the established pier-head lines in either State, and at an elevation above the river not less than that of the existing Brooklyn suspension bridge over the East river, and which elevation may be increased by the Secretary of War as hereinafter provided, and that no pier or other obstruction to navigation, either of temporary or permanent character, shall be constructed in the river between said towers."

3. By section two of the said act it is provided that the construction of said bridge shall be commenced within three years after the passage of the act and completed within ten years after the commencement of construction, but that the Secretary of War could extend the time for the commencement of construction for two additional years, as mentioned therein. It is also further provided in that connection that the company shall submit to the Secretary of

War a plan of the bridge, with a map of the river, as therein prescribed, and, after a hearing as provided therein, the Secretary of War is authorized and directed, upon being satisfied that a bridge built on the plan and at the locality submitted would conform to the conditions of the said act, to notify the company that he approves the plans therefor, whereupon the said company may proceed to the erection of said bridge; all of which was done according to the requirements of the said act, and the company was on the twenty-ninth day of December, 1891, notified by the Secretary of War that he approved the plans for said bridge and at the locality contemplated, which locality is hereinafter more particularly described.

4. By section four of the said act of Congress it is provided that for the purpose of carrying into effect the objects stated therein the persons named in the first section thereof and their associates are constituted and created a body corporate in law, to be known as the North River Bridge Company, with the powers therein mentioned, among which it is provided that the corporation so created may receive, purchase, and also acquire by lawful appropriation and condemnation, upon making proper compensation therefor to be ascertained according to the laws of the State within which the same is located, real and personal property and rights of property, and to mortgage, encumber, charge, pledge, lease, sell, assign, and convey the same, and generally — specially for the fully carrying out of the purposes and intentions of the said act the said company shall have and possess all such rights and powers to enter upon the lands, and for the purchase, acquisition, condemnation, appropriation, occupation, possession, and use of real estate and other property, and for the location, construction, operation, and maintenance of said bridge, with its approaches, terminals, and appurtenances, as are possessed by railroad or bridge companies in the States of New York and New Jersey respectively. It was also provided in said section four, among other things, that all persons, railroads, and telegraph companies, respectively, desiring to use said bridge shall have and be entitled to equal rights and privileges in the passage over and the use of the same and the approaches thereto for a reasonable compensation, &c.; also that sufficient trackage and terminal facilities shall be provided for all railroads desiring to use said bridge and appurtenances; and, further, "in case any litigation arises out of the construction, use, or operation of said bridge or approaches thereto and railroads thereon, or for the condemnation or the appropriation of property in connection therewith under this act, the cause so arising shall be heard and tried before the circuit court of the United States for the judicial district in which the bridge or one of the approaches is located," and that "applications for condemnation or appropriation of property shall be made in the circuit court of the United States for the district in which such property is situated upon the petition of said company, and the hearing and trial of all other proceedings thereon shall conform as nearly as may be to the practice in the courts of the

State in which such district is situated in the case of condemnation or appropriation of property for railroads."

5. The location of the said bridge across the North or Hudson river and the approaches thereto in New Jersey, for the North River Bridge Company, under said act is as follows:

"The centre line of said bridge is on a straight line, intersecting the easterly line of 10th avenue, 150 feet north of the centre line of 23rd street, in New York city, and intersecting the westerly
11 line of Bloomfield street, in Hoboken, New Jersey, 150 feet north of the centre line of 12th street; thence, by a curve of 5,000 feet radius, to a straight line running parallel with and 150 feet north of the centre line of said 12th street, in Hoboken, continued; thence, by a curve of 5,000 feet radius, to a straight line between Hague street and Lake street, in West Hoboken, intersecting Spring street 120 feet north of the centre line of Lake street and intersecting Grand avenue 120 feet south of the centre line of Hague street. At Grand avenue said centre line splits into two branches, the north branch curving north, with a radius of 1,200 feet, to a connection with the tracks of the Northern railroad of New Jersey, and the southern branch curving south, with a radius of 1,300 feet, to a connection with the tracks of the same railroad. The North River Bridge Company has also located and surveyed terminals and connecting approaches to the railroad west, south, and north of the above-described location in Bergen county and will file a map of such addi*p*tional location at a later date. The width of right of way required will be 400 feet, or 200 feet for each side of the centre line, from the State line to Park avenue, in Hoboken, and 250 feet, or 125 feet on each side of centre line, from Park avenue, in Hoboken, to Grand avenue, in Jersey City. From Grand avenue to junction with railroad tracks north and south the right of way required will comprise all land located in the fork between the north and the south curves, with an additional width of 125 feet on the outside of each of said curves."

All of the land included in said location as described
12 within the State of New Jersey is situated within the cities of Hoboken, West Hoboken, and Jersey City, in the county of Hudson, said State of New Jersey. The description of said location as above given, together with a map accompanying the same and in connection therewith, were deposited by the petitioner in the office of the secretary of state of the State of New Jersey on the tenth day of February, 1892, and which show the location and survey of the bridge aforesaid, with its approaches and terminals, as determined upon and located by your petitioner and which are in accordance with the plans approved by the Secretary of War as aforesaid.

6. The route of the approaches to said bridge as located and included within the description and survey aforesaid and deposited in the office of the secretary of state and within the scope of the plans approved by the Secretary of War as aforesaid runs over and across and includes certain lands in the said city of Hoboken, in the county of Hudson, State of New Jersey, which are owned by Mrs.

Susan Luxton, who resides in Jersey City, State of New Jersey, which lands consist of five lots, known and distinguished upon a certain map entitled "Map of property situate at Hoboken, Hudson county, New Jersey, belonging to the estate of John G. Coster, deceased, surveyed and laid out into lots November, 1860, by Daniel Ewen, Austin D. Ewen, city surveyors, New York," on file in the office of the register of the said county of Hudson, as lots numbered seven (7), eight (8), nine (9), ten (10), and eleven (11) in block number one hundred and seven (107), fronting and facing on
13 the easterly side of Madison street, each lot being twenty-five feet front and rear by one hundred feet in depth throughout, and said lots are required and necessary to be used and taken in the construction of said approaches, a description and map of which lots so necessary and required are hereto annexed and referred to and made a part of this petition and application. The said lots are correctly laid down thereon, the centre line of the approach of said bridge running through the middle lot. The said map also corresponds with the Coster map above referred to, and shows the correct location of the said lots. The said lots are situated between 12th and 13th streets, in the city of Hoboken as aforesaid, and the centre line of the approaches, as hereinbefore referred to, runs through the middle lot of the five.

7. Your petitioner and the said Susan Luxton cannot agree for the use or purchase of the said land so required and necessary to be taken for the construction of said approaches, although your petitioner has attempted in good faith to agree with the said Susan Luxton as to the price or value of said land and has offered and is ready to pay the full price and value thereof; that the only person or corporation interested in the said land so required and necessary to be used in the construction of said approaches is the said Susan Luxton, the owner of the said lots aforesaid, the same being vacant and unoccupied.

8. Your petitioner, therefore, requests your honors to appoint three disinterested, impartial, and judicious freeholders, resi-
14 dents of the said county in which said lands lie, commissioners to examine and appraise the said lands so required and necessary to be taken as aforesaid in the construction of said approaches and to assess the damages to be sustained in consequence of such taking and occupancy thereof and whatever said commissioners so to be appointed are authorized or required by law to assess, and that your honors will appoint *and* time when and place where your honors will proceed to hear this application and make the said appointment, and that your honors will prescribe the notice to be given to said owner of said lands of the said application and of the time and place of hearing the same.

And your petitioner, as in duty bound, will ever pray, &c.

Dated February 23, 1892.

NORTH RIVER BRIDGE COMPANY,
By BEDLE, MUIRHEID, McGEE & BEDLE, JR.,
Attorneys.

STATE OF NEW JERSEY, }
County of Hudson, } ss.:

Gustav Lindenthal, of ——, ——, being duly sworn, on his oath saith that he is the chief engineer of the North River Bridge Company, in charge of the construction of the bridge and approaches thereto of the said company, and that the matter and things in the foregoing petition or application set forth are true to the best of deponent's knowledge and belief.

15 Deponent further saith that the annexed papers are a correct and particular description and map or survey of the land (being five lots) owned by Susan Luxton, and which lots are necessary and required to be taken in the construction of the approaches for the said bridge, and that said company has endeavored to acquire said lots by purchase, but has been unable to agree with the said Susan Luxton as to the price therefor, and that the said company cannot agree with the said Susan Luxton for the use or the purchase thereof.

GUSTAV LINDENTHAL, *Ch'f Eng'r.*

Sworn and subscribed before me this twenty-third day of February, A. D. 1892.

L. D. FOWLER,
[SEAL.] *Notary Public, N. J.*

All those certain five lots, tracts, or parcels of land and premises hereinafter particularly described, situate, lying, and being in the city of Hoboken, in the county of Hudson and State of New Jersey, and which are known and distinguished upon a certain map entitled "Map of property situate at Hoboken, Hudson county, New Jersey, belonging to the estate of John G. Coster, deceased, surveyed and laid out into lots November, 1860, by Daniel Ewen, Austin D. Ewen, city surveyors, New York," on file in the office of the register of the said county of Hudson, as lots numbered (7) seven, (8) eight, (9) nine, (10) ten, and (11) eleven, in block number (107)
16 one hundred and seven, fronting and facing on the easterly side of Madison street, each lot being twenty-five feet front and rear by one hundred feet in depth throughout, as by referring to said map will more fully appear.

Endorsed: U. S. circuit court, district of New Jersey. In the matter of the application of the North River Bridge Co. to condemn land of Susan Luxton. Petition, &c. Bedle, Muirheid, McGee & Bedle, Jr., att'ys of petitioner. Filed Feb. 29, 1892. S. D. Oliphant, clerk.

(Here follows diagram marked p. 17.)

18 In U. S. Circuit Court for the Third Circuit, in the District of New Jersey.

In the Matter of the Application of THE NORTH RIVER BRIDGE COMPANY to Condemn Lands of Susan Luxton.

Upon reading and filing the petition of the North River Bridge Company to appoint commissioners to examine and appraise certain lands of Susan Luxton, situated in the city of Hoboken, Hudson county, New Jersey, required and necessary to be taken in the construction of approaches for the North River bridge as therein mentioned, and to assess the damages to be sustained in consequence of the taking and occupancy thereof, and whatever the said commissioners are authorized or required by law to assess, and the said petition and papers thereto annexed being verified by the oath of Gustav Lindenthal, the chief engineer of the said company, the court doth hereby assign Tuesday, the twenty-second day of March, eighteen hundred and ninety-two, at the hour of ten o'clock in the forenoon, at the United States Government building, in the city of Trenton, State of New Jersey, in which this court is held, as the time and place when and where the said court will proceed to hear the application in the said petition contained for the appointment of the commissioners therein named and to proceed thereon according to law.

19 The court doth also further direct the North River Bridge Company to give to the said Susan Luxton notice in writing that the lands referred to in said petition are required for the approaches to the North River bridge mentioned therein and of the said application and of the time and place so fixed for the hearing thereof and for the appointment of commissioners by serving an uncertified copy of the said petition and the description and map thereto annexed, together with a certified copy of this order, upon the said Susan Luxton at least ten days previous to the time so fixed for said hearing.

Dated this 29th day of February, 1892.

EDW. T. GREEN, *J.*

Endorsed: U. S. circuit court. In the matter of the application of the North River Bridge Company to condemn lands of Susan Luxton. Order appointing time for hearing. Filed Feb. 29, 1892. S. D. Oliphant, clerk.

20 *Order Appointing Commissioners, &c.*

In the U. S. Circuit Court for the Third Circuit, District of New Jersey.

In the Matter of the Application of THE NORTH RIVER BRIDGE COMPANY to Condemn Land of Susan Luxton.

Whereas the North River Bridge Company hath heretofore made application to this court in writing, by petition, to which reference is made for the full particulars thereof, setting forth, among other

things, that the petitioner is a corporation duly organized under the provisions of an act of Congress of the United States entitled "An act to incorporate the North River Bridge Company and to authorize the construction of a bridge and approaches at New York city across the Hudson river, to regulate commerce in and over such bridge between the States of New York and New Jersey, and to establish such bridge a military and post road," approved by the President July 11, 1890; also the location of the bridge across the North or Hudson river and the approaches thereto in New Jersey as provided in the said act, and that the route of the approaches to said bridge as located runs over and across and includes certain lands in the city of Hoboken, in the county of Hudson, State of New Jersey, which are owned by Mrs. Susan Luxton, who resides in Jersey City, State of New Jersey, which lands consist of five lots, known and dis-
21 tinguished upon a certain map entitled "Map of property situate at Hoboken, Hudson county, New Jersey, belonging to the estate of John G. Coster, deceased, surveyed and laid out into lots November, 1860, by Daniel Ewen and Austin D. Ewen, city surveyors, New York," on file in the office of the register of the said county of Hudson, as lots numbered seven (7), eight (8), nine (9), ten (10), and eleven (11), in block numbered one hundred and seven (107), fronting and facing on the easterly side of Madison street, each lot being twenty-five feet front and rear by one hundred feet in depth throughout, and that said lots are required and necessary to be used and taken in the construction of said approaches, a description and map of which lots so necessary and required being annexed and referred to in and made a part of the said petition, and said lots being correctly laid down thereon, the centre line of the approach to said bridge running through the middle lot, the said map also corresponding with the Coster map above referred to and showing the correct location of the said lots, which lots are situate between 12th and 13th streets, in the city of Hoboken as aforesaid, and the centre line of the approaches running through the middle lot of the five, and praying this court to appoint three disinterested, impartial, and judicious freeholders, residents of the said county in which said lands lie, to examine and appraise the said lands so required by and necessary to be taken as aforesaid in the construction of the said approaches, and to assess the damages to be sustained in consequence of said taking and occupancy thereof and whatever said commissioners so to be appointed are author-
22 ized or required by law to assess, and also to appoint a time when and place where this court would hear the said application and make the said appointment and prescribe the notice to be given to said owner of the said lands of the said application and of the time and place of hearing the same, as by reference to the said petition will more fully appear;

And whereas this court did, the twenty-ninth day of February, eighteen hundred and ninety-two, assign Tuesday, the twenty-second day of March, eighteen hundred and ninety-two, at the hour of ten o'clock in the forenoon, at the United States Government building, in the city of Trenton, State of New Jersey, in which this

court is held, as the time and place when and where this court would proceed to hear the application in the said petition contained for the appointment of the commissioners therein named, and to proceed thereon according to law;

And whereas this court did also further direct the North River Bridge Company to give to the said Susan Luxton notice in writing that the lands referred to in the said petition are required for the main approaches to the North River bridge mentioned therein, and of the said application and of the time and place so fixed for the hearing thereof and for the appointment of commissioners, by serving a copy of the said petition and the description and map thereto annexed, together with a copy of the said order, upon the said Susan Luxton at least ten days previous to the time so fixed for said hearing;

23 And whereas it appears to the satisfaction of this court that notice hath been given as provided in the said order, and that a copy of the petition and a description and map thereto annexed, with a copy of the said order, have been served as required therein, and all the provisions of the said order have been complied with, and Charles L. Corbin having appeared on the twenty-second day of March, eighteen hundred and ninety-two, on behalf of the said Susan Luxton, as her attorney and counsel, being the time and at the place mentioned in the said order, and the hearing having been continued by consent of Joseph D. Bedle, counsel of the said company, and Charles L. Corbin, counsel of the said Susan Luxton, to the twenty-ninth day of March, eighteen hundred and ninety-two, the hour and place mentioned in the said order, and on that day the respective counsel aforesaid appearing before this court, the said Joseph D. Bedle for the petitioner and the said Charles L. Corbin against the appointment of commissioners as prayed for in the petition, and he, as the counsel of Mrs. Susan Luxton, desiring further time to be heard in the matter, further hearing was postponed to Wednesday, the sixth day of April, eighteen hundred and ninety-two, before this court, to hear what further might be said upon the matter on either side, and the hearing upon the said application having been further continued by the court to the sixth day of April, eighteen hundred and ninety-two, and the counsel of the said Susan Luxton having been heard in opposition to the said application, he alleging that the act of Congress aforesaid is unconstitutional, and particularly that Congress could

24 not confer the right of eminent domain upon the complainant, and the said counsel of the company having been heard in behalf of the said application, and the court being satisfied that the matters and things in the said *said* petition set forth are true, and no sufficient cause being shown against the granting of the said application—

It is on this nineteenth day of April, eighteen hundred and ninety-two, by the court ordered that the said application be, and the same is hereby, granted, and this court, by virtue of the power and authority vested therein by law, doth hereby appoint John J. Toffey, George F. Perkins, and William Utz, three disinterested,

impartial, judicious freeholders, residents of the county of Hudson and State of New Jersey, commissioners to examine and appraise the said lands of the said Susan Luxton required and necessary to be taken by the North River Bridge Company, as is in said petition set forth, and to assess the damages to be sustained by her in consequence of the taking and occupancy thereof, and whatever said commissioners are authorized by law to assess.

It is also further ordered that said commissioners do cause to be given to the said Susan Luxton and to the said company ten days' notice in writing of the time when and place where they will meet and proceed to execute their duties under this appointment.

Liberty is hereby given to either party to apply for jurisdiction on notice.

Witness my hand and seal of the court.

[L. S.] M. W. ACHESON,
Circuit Judge.

25 Endorsed: U. S. circuit court. In the matter of the application of the North River Bridge Company to condemn land of Susan Luxton. Order appointing commissioners, &c. Filed April 28, 1892. S. D. Oliphant, clerk.

26 STATE OF NEW JERSEY, } ss.:
County of Hudson, }

We, John J. Toffey, George F. Perkins, and William Utz, commissioners named in an order of appointment of the circuit court of the United States for the third circuit, district of New Jersey, bearing date the nineteenth day of April, eighteen hundred and ninety-two, in the matter of the application of the North River Bridge Company to condemn lands of Susan Luxton, being duly sworn according to law, do each solemnly promise and swear that we will faithfully and impartially examine and determine the matter in question in the said order designated and will make a true report according to the best of our skill and understanding, so help us God.

JOHN J. TOFFEY.
GEO. F. PERKINS.
WILLIAM UTZ.

Subscribed and sworn to this 19th day of April, A. D. 1893, before me—

[L. S.] THEO. RURODE,
Notary Public of the State of New Jersey.

U. S. circuit court, district of New Jersey. In the matter of the application of the North River Bridge Company to condemn land of Susan Luxton. Oath of commissioners.

27 We, John J. Toffey, George F. Perkins, and William Utz, the commissioners named in an order of appointment of the circuit court of the United States for the third circuit, district of

New Jersey, bearing date the nineteenth day of April, eighteen hundred and ninety-two, in the matter of the application of the North River Bridge Company to condemn land of Susan Luxton, do hereby appoint Monday, the first day of May, eighteen hundred and ninety-three, at one o'clock in the afternoon, at Duke's hotel, near the Hoboken ferry, in the city of Hoboken, Hudson county, State of New Jersey, as the time when and place where we will meet and proceed to execute our duties under said appointment, and we direct the North River Bridge Company in the said order named to give to Susan Luxton ten days' previous notice of the time and place of such meeting as hereby appointed.

Dated the nineteenth day of April, 1893.

JOHN J. TOFFEY.
GEO. F. PERKINS.
WILLIAM UTZ.

Endorsed: U. S. circuit court, district of New Jersey. In the matter of the application of the North River Bridge Company to condemn land of Susan Luxton. Notice fixing time of meeting.

28 U. S. Circuit Court, District of New Jersey.

In the Matter of the Application of THE NORTH RIVER BRIDGE COMPANY to Condemn Land of Susan Luxton.

To Susan Luxton:

You are hereby notified that John J. Toffey, George F. Perkins, and William Utz, commissioners named in an order of appointment of the circuit court of the United States for the third circuit, district of New Jersey, in the above-stated matter, bearing date the nineteenth day of April, eighteen hundred and ninety-two, have appointed Monday, the first day of May, eighteen hundred and ninety-three, at one o'clock in the afternoon, at Duke's hotel, near the Hoboken ferry, in the city of Hoboken, Hudson county, State of New Jersey, as the time when and place where they will meet and proceed to execute their duties under the said appointment, and, in obedience to their direction, we hereby give you ten days' previous notice of the time and place of such meeting.

Dated April 19, 1893.

THE NORTH RIVER BRIDGE COMPANY,
By BEDLE, McGEE & BEDLE, *Attorneys.*

Witness:
G. J. LUXTON.

APRIL 19TH, 1893.

Admission of service.

SUSAN LUXTON.

29 Endorsed: U. S. circuit court, district of New Jersey. In the matter of the application of the North River Bridge Company to condemn land of Susan Luxton. Notice of meeting of commissioners. Bedle, McGee & Bedle, att'ys of North River Bridge Company.

U. S. Circuit Court, District of New Jersey.

In the Matter of the Application of THE NORTH RIVER BRIDGE COMPANY to Condemn Land of Susan Luxton.

To Susan Luxton:

You are hereby notified that John J. Toffey, George F. Perkins, and William Utz, commissioners named in an order of appointment of the circuit court of the United States for the third circuit, district of New Jersey, in the above-stated matter, bearing date the nineteenth day of April, eighteen hundred and ninety-two, have appointed Monday, the first day of May, eighteen hundred and ninety-three, at one o'clock in the afternoon, at Duke's hotel, near the Hoboken ferry, in the city of Hoboken, Hudson county, State of New Jersey, as the time when and place where they will meet and proceed to execute their duties under the said appointment, and, in obedience to their direction, we hereby give you ten days' previous notice of the time and place of such meeting.

30 Dated April 19, 1893.

THE NORTH RIVER BRIDGE COMPANY,
By BEDLE, McGEE & BEDLE, *Attorneys.*

Endorsed: U. S. circuit court, district of New Jersey. In the matter of the application of the North River Bridge Company to condemn land of Susan Luxton. Notice of meeting of commissioners. Bedle, McKee & Bedle, att'ys of North River Bridge Company. Due service of the within acknowledged this 19th day of April, 1893. Collins & Corbin, att'ys for Susan Luxton.

Award and Report of Commissioners.

In the U. S. Circuit Court for the Third Circuit, District of New Jersey.

In the Matter of the Application of THE NORTH RIVER BRIDGE COMPANY to Condemn Land of Susan Luxton.

We, John J. Toffey, George F. Perkins, and William Utz, commissioners appointed by the United States circuit court for the third circuit, district of New Jersey, on the nineteenth day of April, eighteen hundred and ninety-two, upon the application of the North River Bridge Company, a corporation duly organized under an act of Congress of the United States entitled "An act to incorporate the North River Bridge Company, and to authorize the construction of a bridge and approaches at New York city across the Hudson river, to regulate commerce in and over such bridge between the States
31 of New York and New Jersey, and to establish such bridge a military and post-road," approved by the President July 11, 1890, made in writing by petition to the said court to examine and appraise the lands of Susan Luxton described in the said petition, and hereinafter described, required and necessary to be taken in the construction of the approaches to the bridge in New Jersey of

the North River Bridge Company across the North or Hudson river, and to assess the damages to be sustained by her in consequence of the taking and occupancy thereof by the said company, and whatever we, as commissioners, are authorized by law to assess as such commissioners, as in and by the order of our appointment will more fully appear, having first taken and subscribed an oath before Theodore Rurode, a notary public of the State of New Jersey, duly authorized to administer the same, faithfully and impartially to examine the matter in question, and to make a true report according to the best of our skill and understanding; and it having been duly proved to our satisfaction that Susan Luxton, the owner of the said lands, hath been duly notified by ten days' notice, in writing, caused to be given to the said Susan Luxton and to the said company, to meet at Duke's hotel, near the Hoboken ferry, in the city of Hoboken, county of Hudson, State of New Jersey, on the first day of May, eighteen hundred and ninety-three, at one o'clock in the afternoon of that day; and the said The North River Bridge Company and the said Susan Luxton, the owner of the said lands, having been represented before us by their counsel respectively:

32 We, the said commissioners, did meet at the time and place aforesaid, and we thereafter viewed and examined the said lands, a description and map or diagram of which are hereto annexed and made part of this report and award, being the same lands described in said petition, which said lands are owned by Susan Luxton; and having heard the parties, as well the said Susan Luxton, the owner, as the said company, and we having fully examined and appraised the said lands, and fully considered all that was offered before us by the respective parties, do appraise the said lands and assess the damages to which the said owner is entitled and which she has sustained by reason of the taking and occupancy of the said lands by the said corporation, and whatever we as such commissioners are authorized and required by law to assess, and having made a just and equitable estimate and appraisement of the value of the said lands and as assessment of the damages to be paid by said company for such lands and damages aforesaid, do award and report that the said company pay to the said Susan Luxton the sum of two thousand dollars for the value of the said lands and all damages as aforesaid and whatever we, as commissioners are authorized and required by law to assess.

Witness our hands and seals this first day of May, eighteen hundred and ninety-three.

JOHN J. TOFFEY. [L. S.]
GEO. F. PERKINS. [L. S.]
WILLIAM UTZ. [L. S.]

33 All those certain five lots, tracts, or parcels of land and premises hereinafter particularly described, situate, lying, and being in the city of Hoboken, in the county of Hudson and State of New Jersey, and which are known and distinguished upon a certain map entitled "Map of property situate at Hoboken, Hudson county, New Jersey, belonging to the estate of John G.

Coster, deceased, surveyed and laid out into lots November, 1860, by Daniel Ewen, Austin D. Ewen, city surveyors, New York," on file in the office of the register of the said county of Hudson as lots numbered (7) seven, (8) eight, (9) nine, (10) ten, and (11) eleven, in block number (107) one hundred and seven, fronting and facing on the easterly side of Madison street, each lot being twenty-five feet front and rear by one hundred feet in depth throughout, as by referring to said map will more fully appear.

Endorsed: In the U. S. circuit court for the third circuit, district of New Jersey. In the matter of application of the North River Bridge Company to condemn land of Susan Luxton. Award and report of commissioners. Filed May 8, 1893.

34 (See map, page 17.)

35 *Notice of Order to Confirm Award and Report of* of *Commissioners, &c.*

In the U. S. Circuit Court for the Third Circuit, District of New Jersey.

In the Matter of the Application of THE NORTH RIVER BRIDGE COMPANY to Condemn Land of Susan Luxton.

To Susan Luxton:

You are hereby notified that an application will be made to the U. S. circuit court for the third circuit, district of New Jersey, on Thursday, the twentieth day of July, eighteen hundred and ninety-three, at the hour of ten in the forenoon, or as soon thereafter as may be heard, at the court-room of said court, in the city of Trenton, State of New Jersey, to approve and confirm the award and report of the commissioners in the above-stated matter made by them on first day of May, eighteen hundred and ninety-three, and filed with the clerk of said court on the eighth day of May, eighteen hundred and ninety-three, and for such further judgment of the court thereon as the North River Bridge Company may be entitled.

Dated July 13, 1893.

Yours, &c., BEDLE, McGEE & BEDLE,
Attorneys of the North River Bridge Company.

(Endorsed:) U. S. circuit court. In the matter of the application of the North River Bridge Company to condemn land of Susan Luxton. Notice of order to confirm award and report of commissioners, &c. Due service of within notice admitted this 13th day of July, A. D. 1893. Charles L. Corbin, counsel & att'y for Susan Luxton. Filed Aug. 10, 1893. S. D. Oliphant, clerk.

36 *Order Confirming Award and Report of Commissioners.*

In the U. S. Circuit Court for the Third Circuit, District of New Jersey.

In the Matter of the Application of THE NORTH RIVER BRIDGE COMPANY to Condemn Land of Susan Luxton.

The commissioners, John J. Toffey, George F. Perkins, and William Utz, appointed in the above-stated matter by this court on the nineteenth day of April, eighteen hundred and ninety-two, having filed their award and report under their hands and seals, bearing date the first day of May, eighteen hundred and ninety-three, with the clerk of this court on the eighth day of May, eighteen hundred and ninety-three, by which it appears that the said commissioners first took and subscribed an oath, according to law, faithfully and impartially to examine the matter in question, and to make a true report, according to the best of their skill and understanding, and that Susan Luxton, the owner of the lands in question, was duly notified by ten days' notice in writing, as also the said The North River Bridge Company, as provided in the said order of appointment, of the time and place hereinafter mentioned, when and where the said commissioners would meet and proceed to execute their duties under the said appointment; and also that the said commissioners, in pursuance of the said notice, did meet at Duke's hotel, near the Hoboken ferry, in the city of Hoboken, county of Hudson, State of New Jersey, on the first day of May, eighteen hundred
37 and ninety-three, at one o'clock in the afternoon of that day, the North River Bridge Company and the said Susan Luxton then and there being represented before the commissioners by their counsel respectively; and the said commissioners having met at the time and place aforesaid, and having viewed and examined the lands, a description and map or diagram of which are annexed to the said report and award and made a part thereof, and being the same lands described in the petition in the above-stated matter, and which lands are owned by Susan Luxton, and having heard the parties, as well the said Susan Luxton, the owner, as the said company, and having fully examined and appraised the said lands, and fully considered all that was offered before them by the respective parties, did appraise the said lands and assess the damages to which the said Susan Luxton, owner, is entitled, and which she has sustained by reason of the taking and occupancy of the said lands by the said corporation, and whatever they as such commissioners were authorized and required by law to assess; and, having made a just and equitable assessment and appraisement of the value of the said lands, and an assessment of the damages to be paid by the said company for such lands and damages aforesaid, did award and report that the said company pay to the said Susan Luxton the sum of two thousand dollars for the value of the said lands and

all damages as aforesaid and whatever they, as commissioners, were authorized and required by law to assess; and due notice having been given to the said Susan Luxton of this application by the North River Bridge Company to approve and confirm the
38 said report and award and for the judgment of the court thereon, and Joseph D. Bedle, counsel of the said company, and Charles L. Corbin, counsel of the said Susan Luxton, having been duly heard upon the said application, and each party waiving all right of appeal from the said award for a trial by jury, but the counsel of the said Susan Luxton having alleged, in opposition to the said application, that the act of Congress approved by the President July 11, 1890, under which the proceedings in question were taken, is unconstitutional, and particularly that Congress could not confer the right of eminent domain upon the North River Bridge Company, under claim of which the proceedings were taken; and, the court being satisfied that no sufficient cause is shown against the granting of the said application, and that the same should be granted—

It is, on this fifth day of August, eighteen hundred and ninety-three, by the court ordered and adjudged that the said award and report of the commissioners be, and the same are hereby, in all respects approved and confirmed, and that the same remain of record in the clerk's office of this court, where filed, together with all the proceedings preliminary thereto and accompanying the same, and on payment or tender of payment of the amount awarded as aforesaid the said The North River Bridge Company is hereby empowered to enter upon and take possession of and hold the lands aforesaid for the purposes for which they are condemned, and the said report or a copy thereof, certified by the clerk of this court, and proof of payment or tender of amount awarded shall at all times
39 be considered as plenary evidence of the right of the North River Bridge Company to have, hold, use, occupy, possess, and enjoy the said lands or of the said owner to recover the amount of said valuation, with interest and costs, in an action of debt, in any court of competent jurisdiction, in a suit to be instituted against the said company if the said company shall neglect or refuse to pay the same for twenty days after demand made of their treasurer, and shall from time to time constitute a lien upon the property of the company in the nature of a mortgage.

M. W. ACHESON,
Circuit Judge.

Endorsed: U. S. circuit court for the third circuit, district of New Jersey. In the matter of the application of the North River Bridge Company to condemn land of Susan Luxton. Order confirming award and report of commissioners. Filed Aug. 10, 1893. S. D. Oliphant, clerk.

40 In the U. S. Circuit Court for the District of New Jersey.

In the Matter of the Application of THE NORTH RIVER BRIDGE COMPANY to Condemn Land of Susan Luxton.

It is hereby stipulated that the North River Bridge Company and Susan Luxton each hereby waives all right of appeal from the award made by the commissioners in the above matter for a trial by jury, but this shall not be construed in any way as a waiver of any questions of law arising upon writ of error apart from the appeal aforesaid.

Dated July 20, 1893.

BEDLE, McGEE & BEDLE,
Attorneys and of Counsel of the North River Bridge Company.
CHARLES L. CORBIN,
Attorney & Counsel for Susan Luxton.

(Endorsed:) In the U. S. circuit court for the district of New Jersey. In the matter of the application of the North River Bridge Company to condemn lands of Susan Luxton. Waiver of appeal. Filed Aug. 10, 1893. S. D. Oliphant, clerk.

41 UNITED STATES OF AMERICA, }
District of New Jersey } ss:

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, third circuit, do hereby certify that the foregoing is a true transcript of the record and proceedings in the matter of the application of the North River Bridge Company to condemn land of Susan Luxton, as the same remain on file and of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Trenton, in said district, this seventh day of October, A. D. 1893.

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: Case No. 15,424. New Jersey C. C. U. S. Term No. 1040. Susan Luxton, plaintiff in error, *vs.* The North River Bridge Company. Filed October 12th, 1893.

Office Supreme Court U. S.
FILED.
JAN 4 1894
JAMES H. McKENNEY,
CLERK.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1893.

TERM NO. 1040.

SUSAN LUXTON, PLAINTIFF IN ERROR,

vs.

THE NORTH RIVER BRIDGE COMPANY.

Brief of the Plaintiff in Error.

GILBERT COLLINS, Jersey City, N. J.,
Attorney and Counsel.

UNITED STATES SUPREME COURT.

SUSAN LUXTON, Plaintiff in Error, *vs.* THE NORTH RIVER BRIDGE CO., Defendant in Error.	In Error to Circuit Court, District of New Jersey.

ARGUMENT FOR PLAINTIFF IN ERROR.

The North River Bridge Company was incorporated by Act of Congress in the year 1890. (26 U. S. Stat. at Large, p. 2 8.) It authorizes the construction of a bridge over the Hudson River between New York and New Jersey, and contains provisions for the taking of land for approaches by condemnation in the United States Circuit Court. An application was made to that Court to condemn certain city lots, in Hoboken, of the plaintiff in error, for an approach to the bridge. The Circuit Court sustained the application and appointed Commissioners to condemn, by order dated on the nineteenth day of April, A. D. 1892. Writ of error was brought to review the order of appointment, but the Court did not decide the case on the merits, but dismissed the writ as premature at the October Term, 1892. Thereupon the condemnation proceeding was duly prosecuted, and an award was made and confirmed, and the present writ brings up the final order of the Circuit Court.

The Charter of the North River Bridge Company, passed in 1890 (26 U. S. Stat., 268, § 4), purports to confer upon the Company power to take land by condemnation. The validity of this grant of power is the question raised by this writ. The plaintiff in error contends for the following proposition :

CONGRESS CANNOT CONFER THE RIGHT OF EMINENT DOMAIN UPON A PRIVATE COMPANY TO TAKE LAND IN A STATE FOR A BRIDGE.

It will hardly be contended that the power to construct this bridge is conferred by the power to establish post roads. In the language of Mr. Justice Grier: "Congress may establish post offices and post roads, but this does not affect or control the absolute power of the State over highways and bridges."

Milnor *v.* N. J. R. R., Vol. 16, U. S. Sup. Ct. Rep., Lawyers' Ed, 799, 806.

The argument that Congress may authorize the building of bridges over navigable waters has always been based on the power to regulate commerce. It rests for authority almost entirely on dicta of the late Justice Bradley. This is high authority, but not so high as to preclude careful consideration in this Court of the important constitutional question now for the first time, as we think, fairly presented by the case before the Court and requiring decision.

The claim here is of the right of eminent domain to take lands within a State for an approach to a bridge, under an Act of Congress. We know of no decision where any such right has been sustained. As was said in King *v.* Am. Transfer Co., 1 Flip Cir. Ct., 1, the rulings have rather tended to the doctrine that the power of Congress over commerce does not operate on lands in a State.

Dicta in favor of the existence of the power are found in the opinions of Justice Bradley, in Stockton *v.* Baltimore & N. Y. R. R., 32 Fed. Rep., 9, 19; and in Cal. *v.* Central Pacific R. R. Co., 127 U. S., 1, 39; but we have yet to find a case where the exercise of eminent domain in a State has been drawn in question and sustained under an Act of Congress for such purpose.

In Pensacola Tel. Co. *v.* Western Union Tel. Co., 6 Otto, 1, the Court sustained a grant by Congress to all telegraph companies of a right to use the military and post roads of the United States, but Ch. J. Waite said: "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made." * * * * * * * *

"No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted."

That the State might authorize the construction of the bridge and approaches in question to the boundary line, and might confer the power of eminent domain for that purpose is undoubted. Such power for such purposes has been often exercised. The power of eminent domain when thus exercised by the State is beyond federal control. The subject matter is one of which the United States Courts cannot take jurisdiction.

West River Bridge Co. *v.* Dix, 6 How. 507, 533, 535.
Balt. & O. R. R. *v.* Pittsburg, &c. R. R., 17 W. Va. 812, 866, approved by Brewer, J., in.
Col. Mid. R'y Co. *v.* Jones, 29 Fed. Rep. 193.

In the language of Mr. Justice Field, in Boom Co. *v.* Patterson, 8 Otto. 403, "The proceeding. to take private property for public use, is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments." If, however, Congress can confer the power of eminent domain for a bridge, such power must interfere with that conferred by the State for the same purpose. Suppose a charter like that of the defendant in error should be granted by concurrent legislation of the States of New Jersey and New York to another company than defendant, and the company, so constituted, should acquire land needed for

the bridge. Could the defendant in error condemn that land and take it from the State Company? If the power to condemn for such purpose, exists at all in Congress, it must be paramount, and the State, in the exercise of the power of eminent domain within its own territory for a legitimate purpose, is not sovereign, but subordinate to the power of the Federal Government for the same purpose.

In Milnor *v.* N. J. R. R. & T. Co., found with briefs of Counsel in Vol. 16, U. S. Sup. Ct. Reports, Lawyers Ed., page 799, 806—Justice Grier laid down the following principles: "Congress has the exclusive power to regulate commerce, but that has never been construed to include the means by which commerce is carried on within a State. Canals, turnpikes, bridges and railroads are as necessary to the commerce between and through the several States as rivers, yet Congress has never pretended to regulate them. Congress may establish post offices and post roads, but this does not affect or control the absolute power of the State over highways and bridges. * * * The police power, to make bridges over its public rivers, is as absolutely vested in a State as the commercial power is in Congress."

The judgment was affirmed by an equally divided Court. It is curious to observe that among the Counsel by whom the exclusive jurisdiction of the State over bridges was maintained (p. 801), was Mr. Bradley, afterwards Justice of this Court, whose opinion in Stockton *v.* Balt. & N. Y. R. R., is now the chief support of the opposite doctrine; we might almost say the only support, for in the cases in the Supreme Court where similar views have been expressed, the question was not necessarily decided. In fact, the question of the power of eminent domain was not strictly involved in Stockton *v.* Balt. & N. Y. R. R. Co. The private rights in land required for the bridge then under consideration had been acquired by grant.

The bridge in question in Milnor *v.* N. J. R. R. & T. Co. crossed the Passaic River, and was not therefore a

bridge between two States, but the precedent is not the less pertinent for our purpose. The power to construct such a bridge as that now proposed across navigable water between two States cannot logically be sustained under the power to regulate commerce except upon principles which would authorize such construction across a navigable stream within a State. One is as necessary to interstate commerce as the other. Every part of the structure is within one State or the other, and forms part of an interstate means of communication, and the same thing is true of every railroad connecting Pennsylvania with New York City.

That portion of the soil of New Jersey which lies between the center of the Hudson River and Bergen Heights, is not more essential to be used as an instrument of interstate commerce than is that portion which lies between the banks of the Passaic, which is crossed by nearly every railroad connecting New York City with the West.

The interpretation of the Constitution necessary to sustain the charter in question has often been expressly repudiated by eminent judges of this Court.

In Gibbons *v.* Ogden, 9 Wheat. 1, 2 3, it is distinctly conceded that the power to establish ferries between the States has not been surrendered to the Federal Government; and is not included in the powers conferred to regulate commerce. The argument is equally strong as to bridges.

> See State *v.* Freeholders of Hudson, 3 Zab. 206; S. C., 4 Zab., 718, 728.

In Pollard *v.* Hagan 3 How. 212, 223, the law was stated in these terms: "The United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the limits of a State or elsewhere, except in the cases in which it is expressly granted." And the Court specifies as granted the cases referred to in the 16th clause of the 8th section of

Article I., which does not include the power to regulate commerce.

This decision was cited with approval by Swayne, J., in Gilman *v.* Philadelphia, 3 Wall, 713, who says: "The power to authorize the building of bridges is not to be found in the Federal Constitution. It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still."

In U. S. *v.* R. R. Bridge Co., 6 McL., 517, 524, McLean, J , said that Congress had no power to construct a bridge over a navigable water. "This belongs to the local State authority within which the work is to be done."

In Wheeling Bridge Case, 18 How., 421, 436, McLean, J., said: "If, under the commercial power, Congress may make bridges over navigable waters, it will be difficult to find any limitation to such power. Turnpike roads, railroads and canals might on the same principle be built by Congress. So extravagant and absorbing a federal power as this has rarely, if ever, been claimed by anyone, but if the power be found in the Constitution no principle is perceived by which it can be practically restrained. This dilemma leads us to the conclusion that it is not a constitutional power." This was a minority opinion, but the majority did not express disagreement with Justice McLean upon this point.

In Newport & Cinn. Bridge Co. *v.* U. S. 105 U. S. 470, Field, J., approved the foregoing language of Justice McLean. This opinion of Justice Field was also a minority opinion, but in that case the bridge in question was authorized by a State law, so that the Court did not necessarily pass upon the extent of the power of Congress.

The simple provision of the Constitution is that Congress shall have power "to regulate commerce."

Chief Justice Marshall, in Gibbon agst. Ogden (9 Wheat., 190), says commerce is intercourse and "is regulated by prescribing rules for carrying on that intercourse."

And again, in the same case, he says (page 196): "What is this power? It is the power to regulate, that is, to prescribe the rules by which commerce is to be governed." Is it reasonable to say that the power to prescribe a rule implies the power to build a bridge? In the same case (p. 227) Mr. Justice Johnson also defines the power to regulate commerce. He says: "The law of nations regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure." To the same effect see President Madison's last message to Congress, a veto message, dated March 3, 1817.

How remote from this conception of the power to regulate is that contended for by defendant in error. If Congress can confer upon a corporation the powers set forth in the act under consideration, then Congress can exercise those powers through the direct agency of the national government. This result indeed is by no means avoided by Mr. Justice Bradley. He classes together the "power to construct or to authorize individuals or corporations to construct national highways and bridges from State to State."

Cal. agst. Cent. Pac. R. R., 127 U. S., 1, 39.

Statutes conferring power to regulate were familiar when the Constitution was framed; in municipal charters it has always been the usage to confer power to regulate certain matters by ordinance, and so in drafting the national charter power is given to Congress to regulate certain matters by statute. Should not the term "power to regulate" receive the same interpretation, whether it is found in the charter of a city or in the great charter of a nation? A power commonly found in a city charter is to regulate the running of locomotives and cars within the limits of the city. Does this give the city power to construct and operate railroads? Under a power to

regulate ferries can a Board of Aldermen establish a ferry or confer a ferry franchise? Such powers are sometimes given to a municipal government, but they are not given by the power to regulate. Under a power to regulate the sale of liquor, can a city government sell liquor or set up a saloon or an agency of the city to sell it?

Many States have placed the regulation of railroads in the hands of Commissioners, but it has never been imagined that under the power to regulate, the Commissioners could construct or confer power to construct railroads.

When the Constitution provides that Congress shall have power to regulate commerce between the States, does this mean that Congress may promote and facilitate commerce, may provide bridges between the States, may create corporations for their construction and operation, and may authorize such corporations to hold lands in the State, and not only to hold lands, but to take lands by eminent domain? We think that this Court has not yet said as much as this; that the weight of judicial authority is against it, and that the Constitution will not fairly bear this interpretation.

Submitted on printed argument under the Rule.

Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
JAN 4 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE UNITED STATES.

SUSAN LUXTON,

Plaintiff in Error,

vs.

THE NORTH RIVER BRIDGE CO.,

Defendant in Error.

In Error to the U. S. Circuit Court for the District of New Jersey.

No. 1040 of October Term, 1893.

Argument of

JOSEPH D. BEDLE,

Counsel for Defendant in Error.

J. H. Pilson, Printer, 74-76 Hudson St., Jersey City.

United States Supreme Court.

SUSAN LUXTON, Plaintiff in Error, *vs.* THE NORTH RIVER BRIDGE COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of New Jersey.

No. 1,040 of October Term, 1893.

ARGUMENT FOR DEFENDANT IN ERROR.

A writ of error having been heretofore dismissed upon the ground that the same was prematurely issued, the present writ brings up for review, the proceedings after final judgment confirming the award of commissioners. The judgment is found on pages 17-18 of the record.

It is difficult to argue this case, for the reason that I regard the only question raised by the plaintiff in error as too well settled to admit of doubt.

I.

The North River Bridge Company is incorporated under the Act of Congress to construct a bridge across the Hudson River between the States of New York and New Jersey, "and to lay tracks thereon for the connection of the railroads on either side of said river, in order

to facilitate inter-state commerce in the transportation of persons and property, and for vehicle, pedestrian, postal, military, and other purposes;" Sec. 1 of the Act. By Section 3 it is provided "that the bridge, with its approaches and railroad thereover, constructed under the provisions of this act, shall be a lawful structure, and a military and post road, but no toll charges shall be made for the transmission over the same of the mails of the United States, or for the right of way for United States postal telegraph purposes." The persons named in the act, and their associates, are thereby created a corporation, with power to exercise the right of eminent domain as therein provided. The public purposes of the act are clearly stated, and they are within the scope of the Constitution of the United States. It is unnecessary to make further reference to the particulars of the said act, but attention is called to the same without further repetition here.

2.

It cannot be denied that Congress has full power to charter corporations as an appropriate means of carrying out any of the authorized purposes of the Federal government. Morawetz on Corporations, §9, and notes; also §984. This proposition need not be argued, or the cases referred to which recognize it. To accomplish the purposes of the Constitution of the United States, Congress may create a corporation as its own instrumentality, or confer franchises upon corporations of the States for the same purposes. There is no difference in principle.

3.

As a fact, nothing can be clearer than that this bridge is intended to facilitate commerce between the

States, and to be used for postal and military purposes. The power to regulate commerce is amply sufficient to maintain this act, although the other purposes alike justify it.

While it may not be denied that the corporation is lawfully created by the Act of Congress to construct this bridge as a great instrument of commerce, it seems to be contended, that the right of eminent domain cannot be conferred upon the corporation to take lands within the State for the necessary abutments, which are a part of the bridge. That the abutments are a necessary part of the structure, is not denied, but it is claimed that Congress is impotent to carry out the work by the exercise of the power of eminent domain. In other words, that it has no such power. The mere statement of this proposition of the other side, is its own refutation. The law is to the contrary, and should be regarded as settled. Reference is made to the following cases:

91 U. S., 367, Kohl, et al. *vs.* United States.
135 U. S., 641, Cherokee Nation *vs.* Kansas Railway Company.

In connection with this case, see opinion of Mr. Justice Bradley, in Stockton *vs.* Baltimore & N. Y. R. Co., 32 Fed. Rep., 9. Also opinion of same Judge in 127 U. S., page 39, California *vs.* Pacific Railroads. I make reference also to the cases on page 656, in opinion of Mr. Justice Harlan, Cherokee Nation case. See also 30 Fed. Rep. 723, Decker *vs.* Baltimore & N. Y. R. Co., Judge Wallace.

It is unnecessary for me to go over these cases in detail, or to refer to others, which by *dicta* and general

principles declared, sustain the right of Congress to confer the power of eminent domain; but it is sufficient for me to say that in view of the well recognized action of Congress by this Court, in bestowing franchises for like purposes as this corporation, including the power of eminent domain, it is too late now to question the constitutionality of this act. The principles involved should be regarded as conclusively settled against the plaintiff in error, and the judgment of the Circuit Court be affirmed.

The act in question contemplates a structure of great national importance, and the powers therein were conferred in the light of the adjudications of this Court.

This case is respectfully submitted upon printed arguments under the rule.

Counsel for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

In the Matter of the Application of JOHN C. CREVIER to be allowed to intervene in the case of SUSAN LUXTON,
Plaintiff in Error,
vs.
THE NORTH RIVER BRIDGE COMPANY,
Defendant in Error.

No. 1040.

NOTICE TO COUNSEL IN THE CAUSE OF APPLICATION TO INTERVENE, AND PROOF OF SERVICE THEREOF.

JOSIAH M. VALE,
Counsel for Petitioner for leave to Intervene,
Washington, D. C.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

In the Matter of the Application of JOHN C. CREVIER to be allowed to intervene in the case of SUSAN LUXTON,

Plaintiff in Error,

vs.

THE NORTH RIVER BRIDGE COMPANY,
Defendant in Error.

No. 1040.

GILBERT COLLINS, ESQ.,
Attorney and Counsellor at Law, Counsel for Susan Luxton,
No. 243 Washington Street,
Jersey City, N. J.

And JOSEPH D. BEDLE, ESQ.,
Attorney and Counsellor at Law, Counsel for the North River Bridge Company,
No. 1 Exchange Place,
Jersey City, N. J.

GENTLEMEN—On the 5th day of February, A. D. 1894, upon a motion filed on the part of John C. Crevier for leave to intervene in the cause of Susan Luxton, Plaintiff in Error, against The North River Bridge Company, Defendant in Error, being cause No. 1040, pend-

ing in the Supreme Court of the United States, leave was granted by the Court to file the petition, a copy whereof is hereto attached together with copies of the supporting affidavit of John T. M. Brewster, verified under oath on the 24th day of January, A. D. 1894, and that of Ludovic A. Damainville, verified under oath on the 19th day of January, 1894, the petitioner thereupon to give notice to counsel in the cause that the application referred to in said petition will be made; now, therefore, you and each of you, being the counsel of record in the said cause, will please take notice that on Monday, the 12th day of March, A. D. 1894, at the sitting of the Court, or as soon thereafter as counsel can be heard, the said petition will be called up for such further proceedings as the Court may then order.

JOSIAH M. VALE,
Counsel for John C. Crevier,
No. 928 F Street, N. W.,
Washington, D. C.

DISTRICT OF COLUMBIA, ss.:

I, JOSIAH M. VALE, do state on oath that on the 14th day of February, A. D. 1894, I deposited in the United States mail with postage fully paid at the City of Washington in the District of Columbia a copy of the notice hereto attached with the accompanying petition and affidavits in the matter of the application of John C. Crevier to be allowed to intervene in the case of Susan Luxton Plaintiff in Error against The North River Bridge Company, Defendant in Error, in cause No. 1040 pending in the Supreme Court of the United States the notice and envelope enclosing same being

addressed to Gilbert Collins Esq., attorney and counsellor at law, counsel for Susan Luxton, at No. 243, Washington Street, Jersey City, New Jersey, and at the same time and place I deposited in the United States mail postage fully paid the said notice with the attached petition and affidavits which, with the envelope enclosing the same was addressed to Joseph D. Bedle Esq., attorney and counsellor at law, counsel for the North River Bridge Company, No. 1, Exchange Place, Jersey City, New Jersey, and that affiant is informed and believes the addresses named herein are the proper addresses of the counsel in said cause.

JOSIAH M. VALE.

Subscribed and sworn to before me, THOS. S. HOPKINS, a Notary Public in and for the District of Columbia, this 14th day of February A. D. 1894.

T. S. HOPKINS,
Notary Public.

[SEAL.]

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 1040.

In the Matter of the Application of JOHN C. CREVIER to be allowed to intervene in the case of SUSAN LUXTON,

Plaintiff in Error,

vs.

THE NORTH RIVER BRIDGE COMPANY,

Defendant in Error;

No. 1040, October Term, 1893; and to Dismiss the Writ of Error therein.

PETITION AND AFFIDAVITS.

Joseph M. Vale

Counsel for Petitioner.

C. G. Burgoyne, 146-150 Centre Street, New York.

INDEX.

	PAGE
Petition of John C. Crevier	1
Affidavit of John T. M. Brewster	8
Affidavit of Ludovic A. Damainville	13

Supreme Court of the United States.

In the Matter of the Application of

JOHN C. CREVIER

to be allowed to intervene in the case of SUSAN LUXTON, Plaintiff in Error, against THE NORTH RIVER BRIDGE COMPANY, Defendant in Error, No. 1040, October Term, 1893, and to dismiss the Writ of Error therein.

TO THE HON. MELVILLE W. FULLER, CHIEF-JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND ASSOCIATE JUSTICES:

The petition of John C. Crevier respectfully shows to this Honorable Court:

FIRST. That your petitioner is a resident and citizen of the State of New Jersey, and is the owner of certain lands situated, lying and being in the City of Hoboken, County of Hudson, State of New Jersey, described as follows:

All that certain lot, tract or parcel of land, situate, lying and being in the City of Hoboken, in the County of Hudson and State of New Jersey, described as follows, viz.: Commencing at the northeast corner of Washington and Twelfth streets, and running thence northerly along the easterly line of Washington street three hundred and ninety-five (395) feet; thence

easterly and parallel with Twelfth street eighty-seven and fifty hundredths (87.50) feet to a point; thence southerly and parallel with Washington street three hundred and ninety-five (395) feet to the northerly line of Twelfth street, and thence westerly along said line eighty-seven and fifty hundredths (87.50) feet to the point or place of beginning. Being the same premises conveyed to your petitioner by Mary P. Lewis, widow, by deed dated December 19, 1893, and recorded in Liber 589 of Deeds for said Hudson County on page 124, for the sum of seventy-one thousand eight hundred dollars; that said premises are covered with substantial buildings, and are located upon the principal thoroughfare of the City of Hoboken, to wit, Washington street; that he is also the owner of other tracts of land in Hudson County within the lines of the proposed approaches of the North River Bridge Company hereinafter mentioned.

And the said premises are affected and covered by the alleged location heretofore made of the approach in New Jersey for The North River Bridge Company, as set out in the fifth paragraph of the petition of The North River Bridge Company, to condemn lands of Susan Luxton, and contained at folio eleven of the record of the said case pending in this Court entitled as above stated.

Second. That The North River Bridge Company is alleged to be a corporation chartered by Chapter 669 of the Laws of the Fifty-first Congress, approved July 11th, 1890, for the purpose of constructing and operating a bridge across the Hudson River, at the City of New York, and said alleged corporation has located this bridge, and has made an alleged location for its said bridge and approaches thereto in the State of New Jersey, which said approach in New Jersey lies over and upon the lands of the petitioner as above mentioned.

THIRD. That there is now pending in this Court a case entitled Susan Luxton, plaintiff in error, against The North River Bridge Company, defendant in error, being No. 1040 on the calendar of the October Term, 1893, of this Court.

FOURTH. That it is alleged in the said record in the said case that the North River Bridge Company brought proceedings to condemn the lands of the said Susan Luxton that resulted in an order for the said condemnation, and the plaintiff in error has sued out her writ of error, and the fifth assignment of error is as follows:

"That by said judgment it was adjudged that the power of eminent domain had been conferred upon the North River Bridge Company to take the land of Susan Luxton, in the City of Hoboken, N. J., for the purposes of a bridge against her will by force of the Act of Congress, approved July 11th, 1890, in said judgment cited, whereas it should have been adjudged that no power to take such lands was conferred by said act, or could be conferred, by Congress, and the appointment of commissioners should have been denied."

FIFTH. That the issue thus brought up by the said writ of error as to the constitutionality of the charter by Congress of the said bridge company involves a constitutional question of the highest importance, which has never been adjudicated upon in this Court, except in one case by a divided court, and is a question in which your petitioner has an interest as the owner of an interest in lands in the State of New Jersey, effected by the said location and liable to be condemned in subsequent proceedings taken by the said North River Bridge Company, and the decision of the said Luxton case will necessarily affect the scope and character of any defense that your petitioner might interpose in any subsequent proceeding by said North River Bridge Company to condemn his land.

SIXTH. That the question involved is a question as to whether Congress has the power to enter into commerce and carry it on by any of the agencies proper for that purpose, and incidentally involves the question of the extent of the power of Congress over internal improvements.

SEVENTH. That a question of such importance should receive the fullest argument before the full bench, between litigants earnestly striving to obtain the result claimed to be sought for by each.

EIGHTH. Upon information and belief, that the said suit entitled "Susan Luxton, Plaintiff in Error, against the North River Bridge Company, Defendant in Error," is fictitious. There is no real dispute between the plaintiff and defendant in said suit, but on the contrary, their interests are one and the same, and are adverse to the interest of the petitioners herein.

NINTH. Upon information and belief that the said Susan Luxton and the North River Bridge Company are attempting to procure the opinion of this Court upon a question of law, in the decision of which they have a common interest opposite to that of the petitioners and other persons who are not parties to the suit.

TENTH. Upon information and belief, that the said Susan Luxton is a mere nominal plaintiff herein; that she is a woman and the mother of one George J. Luxton, a real estate agent, of No. 596 Palisade avenue, Jersey City, New Jersey.

ELEVENTH. Upon information and belief, that one Gustave Lindenthal is an incorporator named in the charter of the North River Bridge Company, and is the chief engineer of the said company; that during the last two years or so, under an arrangement between

the said Gustave Lindenthal and said George J. Luxton, the said George J. Luxton has been purchasing property in Hoboken along the line of the approach to the proposed location of the said North River Bridge Company, and paid for the same with moneys furnished in whole or part by the North River Bridge Company, or the incorporators or stockholders of the said company interested in it, title to the said lands being taken in the name of Susan Luxton, the mother of said George J. Luxton, or Louise C. Luxton, the wife of said George J. Luxton.

TWELFTH. Upon information and belief, that the particular premises sought to be condemned by the North River Bridge Company in the said suit were purchased with the moneys obtained from the North River Bridge Company or its incorporators or stockholders interested in the said company, and the title to the same taken in the name of Susan Luxton.

THIRTEENTH. Upon information and belief, that thereupon the North River Bridge Company began the condemnation proceedings for the purpose of having a determination of the said law question through the nominal plaintiff and defendant therein, while in fact the said North River Bridge Company practically controls both sides of the said litigation, and either itself or through its officers, stockholders or directors, and parties interested in the said company, has advanced all moneys necessary to carry on the said litigation on both sides, and to pay the attorneys and counsel fees on both sides, of the same.

FOURTEENTH. Upon information and belief that, in spite of the fact that such a grave constitutional question is involved in said case, the plaintiff in error and defendant in error herein have submitted the same under the 20th rule without argument before the full Court, and the plaintiff in error, and defendant in error

acting in concert to obtain a decision in said case by a short cut before the said case could be regularly brought up for decision in this Court, brought a writ of error to reverse an order appointing Commissioners to assess damages in the said case, and on the 22d day of December, 1892, submitted the same without argument before the full bench under the 20th rule, and, upon the briefs submitted by both sides on that occasion, the constitutional question was argued, while no attempt was made by the defendant in error to obtain a dismissal of a writ on the ground for want of jurisdiction, and not passing on the constitutional question involved.

FIFTEENTH. That in the record of the said case, No. 1040, on the October Term, 1893, calendar, it appears that the said Geo. J. Luxton is the surety for the plaintiff in error therein upon the bond given on said writ of error, and the land owner waived an appeal to a jury on the value question (Record, fols. Nos. 1 and 2, p. 19).

SIXTEENTH. That the source of the information and belief of your petitioner as to the above matters alleged upon information and belief are copies of the records in said case and the affidavits of John T. M. Brewster, verified the 24th day of January, 1894, and of Ludovic Damainville verified the 19th day of January, 1894, hereto annexed.

Wherefore, your petitioner begs leave to be allowed to intervene in the said suit of Susan Luxton, plaintiff in error, against The North River Bridge Company, defendant in error, No. 1040 on the calendar of October Term, 1893, of this Court, and to move to dismiss the said writ of error upon the ground that the said suit is fictitious, and that there is no real controversy between the parties thereto, and that the said suit is now prosecuted to obtain a decree on a constitutional matter to

affect the rights of your petitioner and other parties really interested adversely to the parties in said suit, but not parties to the record therein, and that the parties and attorneys in the said suit of Luxton vs. The North River Bridge Company file answers to interrogatories to be propounded by the Court or your petitioner touching the matters set forth in this petition, and that this matter be referred to a Master for that purpose, and that, in case an issue is raised by said answers to said interrogatories, then that a rule to show cause issue why the said suit should not be dismissed returnable in such reasonable time as the Court may name, giving leave to both parties, in the meantime, to take depositions on sufficient notice before any Commissioner of the United States, in support of the rule and against it. And that your petitioner have such other or further order or relief as to the Court may seem proper. And your petitioner will ever pray.

At Hoboken, January 25, A. D. 1894.

JOHN C. CREVIER.

Witness: JOHN T. EDWARDS.

Josiah M. Vale
Counsel

UNITED STATES OF AMERICA,
State of New Jersey, } ss.:
COUNTY OF HUDSON,

JOHN C. CREVIER, being duly sworn, deposes and says:

First. I am the petitioner above named. I have read the foregoing petition and know the contents thereof, and the matters and facts stated therein are true to the best of my knowledge, information and belief.

JOHN C. CREVIER.

Sworn and subscribed to before me this 25th day of January, 1894.

JOHN T. EDWARDS,
[SEAL.] Notary Public of New Jersey.

SUPREME COURT OF THE UNITED STATES.

In the Matter of the Application of

JOHN C. CREVIER

to be allowed to intervene in the case of SUSAN LUXTON, Plaintiff in Error, against THE NORTH RIVER BRIDGE COMPANY, Defendant in Error, Number 1040 on the Calendar of October Term, 1893, of this Court, and to dismiss the Writ of Error therein.

STATE OF NEW YORK, }
County of New York, } ss.:

JOHN T. M. BREWSTER, being duly sworn, deposes and says: I am of the age of twenty-one years and upwards, and reside in the City of New York; I know Susan Luxton and George J. Luxton. On Tuesday, the 17th day of October, 1893, I went to the office of George J. Luxton, No. 596 Palisade avenue, Jersey City; he was absent, and I saw the clerk in charge; he was a man with red whiskers; I conversed with him. In the course of the conversation the said clerk stated to me that Mr. Luxton was a real estate agent; that he was Mr. Luxton's clerk, and that Mr. Luxton had bought a considerable amount of real estate in that vicinity for individuals interested in the bridge-company project; that Mr. Luxton was interested in the matter, and that Mr. Luxton's mother was Susan, and that his wife's name was Louise, and that Mr. Luxton was her second child. On the 18th day of October, 1893, I saw Mrs. Susan Luxton in her house at No. 598 Palisade avenue, Jersey City; I had a conversation with her. In the course of which the

following occurred: I said to her, "Mrs. Luxton, are you the Susan Luxton who has a suit pending about the bridge company" She answered, "Yes." I asked her, "What is the suit about?" She said, "I do not know anything about it; my son George attends to the whole business." I asked her, "Well, don't you know what it is you signed your name to?" and she said, "I leave it all to George."

She further said that her son was George J. Luxton, the man who has an office next door. On the 18th day of October, 1893, I met George J. Luxton on Palisade avenue, in front of his office, and in the courseof the conversation the following occurred: I said to him that I would like to purchase some property in that vicinity, and if I did purchase property, I should like to purchase it on the line of the proposed bridge, upon which Mr. Luxton replied that he would like to have me come and see him, as he had been purchasing property for some parties who had that very idea in view.

On the 10th day of November, 1893, I met Mr. George J. Luxton at his place of business, 596 Palisade avenue, Jersey City, and had a conversation with him. In the course of the conversation, I asked him if he had been buying property for the bridge people, and he said yes. He took out a map and showed it to me, said map being a map showing a location of the bridge approach through Jersey City and on the west side of the Hudson River, and containing a description of the property on the line and adjacent to the line of the bridge, some portions being marked with a little red line. The tracing being black. He stated to me that the map was a map of a location of the bridge property. That the property marked with the red lines was property that he had either purchased or got options on, in the interest of the bridge people. And he said that some of the options he had obtained were in the name of Mr. Lindenthal, chief engineer, whose office is in William street, New York City. Then after he had

shown me this map I said that there was no use of getting parties interested in property over there, if the bridge people were going to spend all their time in fighting in law courts, as there was one case on already, the case of Luxton vs. The Bridge, and he said that that was a friendly action, and was simply brought for the purpose of finding out the rights that the company would have under the charter, as the charter was very broad, first for the purpose of finding their rights as to whether they could issue bonds; and, second, for the purpose of finding out what rights they have under the charter, for the purpose of condemning land.

He further said that the lower courts had decided the case as they wanted it, and that it was now gone up on appeal, and that there were three hundred cases ahead of it, and they expected to get the same decision there as the courts below had given.

In the course of the conversation, I stated to Mr. Luxton, that I had parties who were desirous of purchasing property on the line of the location of the bridge, if they could be reasonably assured of the true location, and that the bridge company was in good shape to win the pending suit and that I had written out a letter for him to sign, stating the facts as he had stated them to me, which they desired to have signed before they took the trouble to come over and look at the property, and I then presented to him a letter, of which the following is a copy :

"GENTLEMEN—I take pleasure in informing you that most of the property required for the bridge I have either personally purchased or have secured options thereon in the interest of the bridge people.

The suit now pending is entirely a friendly suit and will not jeopardize the advancement of the bridge.

It is brought simply to determine the rights of the bridge charter as to the acquiring of lands for the bridge people. I know this, as my mother is plaint-

iff only for the nominal purposes of determining our rights by law.

All the property along the line of the bridge I know."

George J. Luxton said that the letter was all right, the facts stated were so and he would sign it and send to me.

On the 24th day of January, 1894, I saw said George J. Luxton in relation to said matter again and in the course of the conversation he stated that he was practically the party in the suit which covered three lots down in the meadows. That they got commissioners appointed to appraise the value of the lots ; that his lawyers immediately appealed the case and a decision was made by the Supreme Court saying that before the proceedings could be brought the commissioners must value the property. That the commissioners did value the property that he formally objected to the valuation and took an appeal to the Supreme Court of the United States, and they expected a favorable decision in a few days. That the reason this was done was because under the charter the company had a right to condemn lands, and they took this case as a test case so that they could get a ruling of the Court and prevent any other property owners getting injunctions against the Company when they began to build, and that there was another friendly suit pending in the Court of Appeals of the State of New York, which was brought to determine the right to issue bonds.

Said Luxton then gave me the following letter:

JERSEY CITY, Jan. 24th, 1894.

DEAR SIR—In relation to The North River Bridge Company, that you make your inquiry concerning the Route to be taken, &c., I would say the rout know confirmed by the War Department of United States can not changed, the Company will comence work by July

1st, 1894, there is two question yet to be settle in by the Court, I remain,

Yours Resp't.,

G. J. LUXTON.

I asked him to put in the letter the statement he had made to me that the suit was a friendly suit. He said, " I don't care to do so, as it might compromise matters. But if I, Brewster, would go to Mr. Lindenthal, who was the Engineer, Mr. Lindenthal would undoubtedly, if he could, give me a statement to the effect that the suits were friendly litigations to determine the right to condemn and the right to issue bonds, as the Company intended to issue ninety million dollars, and as soon as the company got a favorable decision of these suits the board of directors had obligated themselves to raise ten millions of dollars.

JOHN T. M. BREWSTER.

Sworn and subscribed before me this 24th day of January, 1894.

JAMES W. PURDY, JR.,
Notary Public,
Kings County.
Cert. filed in N. Y. Co.

[SEAL.]

UNITED STATES SUPREME COURT.

In the Matter of the Application of

JOHN C. CREVIER

to be allowed to intervene in the case of SUSAN LUXTON, Plaintiff in Error, against THE NORTH RIVER BRIDGE COMPANY, Defendant in Error, Number 1040, on the Calendar of October Term, 1893, of this Court, and to dismiss the Writ of Error therein.

CITY AND COUNTY OF NEW YORK, ss.:

LUDOVIC DAMAINVILLE, being duly sworn, deposes and says:

I called on George J. Luxton, at his place of business on Palisade avenue, Jersey City Heights, during the month of November, 1893, with the view of getting some friends or customers to invest in lands on the proposed site of the new bridge. He said he was well acquainted with the land in vicinity, and he wrote me that if I would come over, he would show me the land where the bridge would be placed upon.

He further stated or wrote, that if my parties wanted to purchase some $40,000 worth of land upon which an option had been given to the bridge—option to run a year—that it would be a good investment, as when the bridge was built, which he thought would be built, the

increase value would be a sure thing. He said there was a suit at law pending, but that there would be no trouble, as it was a friendly suit, and would not affect the bridge interest, or words to that effect.

He further said that the option he wanted to sell me had been procured by him for the bridge people, and was owned by them.

LUDOVIC A. DAMAINVILLE.

Sworn to before me this 19th day of January, 1894.

WM. B. MCNIECE,
Notary Public,
N. Y. County.

[SEAL.]

Supreme Court of the United States.

OCTOBER TERM, 1893. NO. 1040.

IN THE MATTER OF THE APPLICATION OF JOHN C. CREVIER TO BE ALLOWED TO INTERVENE IN THE CASE OF SUSAN LUXTON, *Plaintiff in Error*,

vs.

THE NORTH RIVER BRIDGE COMPANY, *Defendant in Error*, No. 1040, OCTOBER TERM, 1893; AND TO DISMISS THE WRIT OF ERROR THEREIN.

ARGUMENT FOR PETITIONER.

Facts.

This is an application by JOHN C. CREVIER to be allowed to intervene and to dismiss the writ of error in the case of SUSAN LUXTON, plaintiff in error, against THE NORTH RIVER BRIDGE COMPANY, defendant in error, on the grounds that that suit is fictitious and that there is no real controversy between the parties, and that the suit is prosecuted to obtain a decree on a constitutional

matter affecting the rights of the petitioner and other parties interested adversely to the parties in the suit, but not parties to the record therein.

The application is made upon a petition supported by affidavits.

In answer to this petition THE NORTH RIVER BRIDGE COMPANY has filed an alleged answer, and SUSAN LUXTON, *while she has not filed an answer*, has filed what purports to be opposing affidavits, one by herself, and another by her counsel.

There is no substantial dispute as to a number of the allegations in the petition, and under these conditions the facts are hereinafter summarized. Where a dispute exists, or, rather, is pretended to exist, the manner in which the issue is raised is shown by putting in parallel columns the allegations of the petition and of the alleged answers of the two alleged litigants.

THE PETITION SETS FORTH :

FIRST. That the petitioner is a resident and citizen of the State of New Jersey, and is the owner of certain lands in the City of Hoboken, County of Hudson, and State of New Jersey, on the northeast corner of Washington and Twelfth streets, three hundred and ninety-five (395) feet by eighty-seven and one-half ($87\frac{1}{2}$) costing seventy-one thousand eight hundred dollars ($71,800), and is also the owner of other lots of land in Hudson County, on the line of the approach of the North River Bridge, and the said premises are on the line of the approach of the North River Bridge as located (petition of John C. Crevier, p. 1).

SECOND. The alleged incorporation of the North River Bridge Company, under Act of Congress, July 11, 1890, for the purpose of bridging the Hudson River at New York (*Idem.*, p. 2).

THIRD AND FOURTH. The pendency of this suit in this Court, the writ of error and the constitutional question brought up, namely, whether Congress has the power to incorporate a bridge company and condemn land in the States (*Id.*, pp. 3 and 4).

FIFTH. The importance of the constitutional question that the lands of the petitioner will be affected by the decision in this case ; and such decision will affect the character of any defense that petitioner might interpose to condemnation proceedings brought by the bridge company against his land *(Id.*, p. 5*)*.

SIXTH. That the question involved is the question of the power of Congress to enter into commerce and carry on internal improvements.

SEVENTH. The importance of this question requires that it should have full argument before the full bench instead of a mere submission.

The eighth paragraph of the petition is denied by the 6th paragraph of the answers of the North River Bridge Company. This answer is put in with an insufficient form of verification and is entirely unsupported by affidavits of any parties or persons shown to have knowledge or likely to have knowledge of the facts charged in the petition.

SUSAN LUXTON, the individual party to the suit, *not being able to put in an answer with a corporate form of verification*, DOES NOT PUT IN ANY ANSWER AT ALL, but instead contents herself with filing two affidavits, one by herself, the other by her counsel. In neither affidavit is any attempt made to answer the allegations of the petition. In one or two instances a fact is stated contradictory to one in the petition—as to the rest they might all be true, and yet every other allegation in the petition be true. Further, in these affidavits there is a studious failure to specifically meet and admit or deny concrete facts set out in the petition and accompaning affidavits, and a failure to fully explain details as to the case that, in view of these charges, need fuller explanation.

In order to best show the truth of these observations we hereafter set out the charges of the petition and accompanying affidavits in one column, the form of answer adopted to each charge by the North River Bridge in the next column, and in the third the affidavit of Susan Luxton. The negatives pregnant in the form of denials made by the bridge company we have indicated by italics. The actual denials contained in the answer of Susan Luxton are restricted to the following:

"I am not a fictitious or nominal party to this suit, and I have not made or authorized any arrangement about the suit." *The resulting admissions from failure to fully answer or deny will be apparent on comparing the scope of the allegations of the petition and affidavits with this unsatisfactory oath to a legal conclusion and a glittering generality.* We have also put in italics those parts of the allegations of the petition and affidavits that stand uncontradicted by Susan Luxton; and in small capitals those parts of the petition and affidavits that stand uncontradicted by either the bridge company or Susan Luxton.

Petition.	**Answer of Bridge Company.**	**Affidavit of Susan Luxton.**
EIGHTH. Upon information and belief that the said suit entitled, "Susan Luxton, Plaintiff in Error, against the North River Bridge Company, Defendant in Error," is fictitious. *There is no real dispute between the plaintiff and defendant in said suit; but, on the contrary, their interests are one and the same, and are adverse to the interest of the petitioners herein.*	6. In regard to the eighth paragraph of the petition, this defendant denies all the statements therein; the same denial is made as to the statements in the ninth paragraph of the petition. In further answering, the defendant saith that the suit referred to in the eighth paragraph is not fictitious or collusive in any sense, and that the interests of the parties thereto are not one and the same; and that, *while the suit as to procedure is not unfriendly,* the dispute is real and *bona fide*. The condemnation proceedings were regularly taken by the North River Bridge Company, and without any arrangement or agreement on its part and Susan Luxton or on her behalf, and the	Susan Luxton, being duly sworn, says: "I am the plaintiff in error in the above-entitled cause; I reside in Jersey City, and have lived there over forty years, and have bought and sold real estate during the last thirty years. MY SON GEORGE LUXTON IS A REAL ESTATE BROKER, AND IS MY AGENT IN MAKING PURCHASES AND SALES. I have bought and sold many vacant lots within the last five years, and own a number of lots in Hoboken in the vicinity of the approach to the North River Bridge besides those in question in this case. I bought the five lots in question in the year 1891, from Frederick N. Eberhard. I bought in all from him fifteen lots for thirty-nine hundred dollars,
NINTH. *Upon information and belief that the said Susan Luxton and the North River Bridge Company are attempting to procure the opinion of this Court upon a question of law in the decision of which they have a common interest opposite to that of the petitioners and other persons who are not parties to the suit.*		

TENTH. Upon information and belief that the said Susan Luxton is a mere nominal plaintiff herein: THAT SHE IS A WOMAN AND THE MOTHER OF ONE GEORGE J. LUXTON, A REAL ESTATE AGENT, OF No. 596 Palisade avenue, JERSEY CITY, New Jersey.

writ of error was sued out of her own act. The said company, at the request of its counsel, consented to facilitate the procedure in order that a speedy determination might be reached, but beyond that there is no arrangement whatever on the part of the said company with reference to the suit.

7. The defendant denies that Susan Luxton is a merely nominal plaintiff in the suit, *but believes that she is the mother of George J. Luxton, who is a real estate agent in Jersey City.* The defendant in this connection would also state that it is informed and believes that John C. Crevier is a rival real estate agent to said Luxton in the City of Hoboken.

subject to large arrears of taxes and assessments.

I paid for these lots out of my own money, and have never sold them nor received any payment for them. I authorized Collins & Corbin to appear for me in the condemnation case of the North River Bridge Company, and to do what was necessary in the matter. MY SON GEORGE LOOKS AFTER MY REAL ESTATE BUSINESS GENERALLY, but he has no interest in this property. I authorized the case to be taken to the United States Supreme Court to determine whether the Bridge Co. could take my lots. I have no acquaintance with John T. M. Brewster, whose affidavit in this matter has been read to me. *I do not remember any such conversation as is stated in his affidavit. I did not tell him, or any one, that I knew nothing about this suit. I did know about it, but any one who comes to see me about buying and selling lots,* I REFER TO MY SON, and I may have done so at the time stated, though I do not recall it. I am not a fictitious or a nominal party to this suit, and I have not made or authorized any arrangement about the suit, except to authorize my counsel to proceed with the case and look after my interest in a proper manner.

The absence of a subsequent denial by Susan Luxton in detail of each of the allegations of the eighth, ninth and tenth paragraphs of the petition is to say the least suggestive. She only denies the legal question embodied in the allegation that she is a fictitious or nominal party to the suit. Every fact she states might be true and yet each of the allegations of the eighth and ninth paragraphs of the petition be true at the same time.

It might be true that Susan Luxton as alleged is the owner of the real estate sought to be condemned in this action, has paid for them out of her own money and has authorized Collins & Corbin to appear for her, and yet it might still be true that "*There is no real dispute between the plaintiff and defendant in said suit, but on the contrary their interests are one and the same, and are adverse to the interests of the petitioners herein;* and that "*the said Susan Luxton and the North River Bridge Company are attempting to procure the opinion of this Court upon a question of law in the decision of which they have a common interest opposite to that of the petitioners and other persons who are not parties to the suit.*" Further, it might be true that Susan Luxton "has not made or authorized any arrangement about the suit except to authorize my counsel to proceed with the case and look after my interests in a proper manner," and yet those allegations of the petition be also true for the reason hereinafter stated.

The eleventh and twelfth paragraphs of the petition set up important allegations, and the absence of any effective denial by the parties to this suit is again best shown by the parallel columns.

Petition.

ELEVENTH. Upon information and belief THAT ONE GUSTAV LINDENTHAL IS AN INCORPORATOR NAMED IN THE CHARTER OF THE NORTH RIVER BRIDGE COMPANY AND IS THE CHIEF ENGINEER OF THE SAID COMPANY; THAT DURING THE LAST TWO YEARS OR SO, UNDER AN ARRANGEMENT BETWEEN SAID GUSTAV LINDENTHAL AND SAID GEORGE J. LUXTON, THE SAID GEORGE J. LUXTON HAS BEEN PURCHASING PROPERTY IN HOBOKEN ALONG THE LINE OF THE APPROACH TO THE PROPOSED LOCATION OF THE SAID NORTH RIVER BRIDGE COMPANY, AND PAID FOR THE SAME WITH MONEYS FURNISHED IN WHOLE OR PART BY the North River Bridge Company OR THE INCORPORATORS OR STOCKHOLDERS OF THE SAID COMPANY INTERESTED IN IT, *title to the said lands being taken in the name of Susan Luxton, the mother of said George J. Luxton, or Louise C. Luxton, the wife of George J. Luxton.*

TWELFTH. Upon information and belief, that the particular premises sought to be condemned by the North River Bridge Company in the said suit were purchased with the moneys obtained from the North River Bridge Company, or its incorporators or stock-

Answer of North River Bridge Co.

8. In answer to paragraph eleven the defendant saith that Gustav Lindenthal is an incorporator named in the charter of the North River Bridge Company, and is the Chief Engineer of the said Company, but he is not and never has been a director of the said Company. The President of the said Company is Jordan L. Mott, an iron manufacturer of New York City, and has been president ever since its organization. The Vice-President is Edward F. C. Young, the President of the First National Bank of Jersey City. Mr. Young has also been Vice-President since its organization. Charles J. Canda, former Assistant Treasurer of the United States, is the Treasurer, and has been from the organization and resides in the City of New York.

In further answering paragraph eleventh, the defendant saith *that no property has been purchased in the City of Hoboken by George J. Luxton for or on behalf of this defendant*, and denies that the North River Bridge Company *or any incorporator or stockholder on its behalf* has paid for any such lands *with any moneys in whole or in part furnished by the North River Bridge Company or on its*

Affidavit of Susan Luxton.

I reside in Jersey City, and have lived there over 40 years, and have bought and sold real estate during the last 30 years. My son George J. Luxton is a real estate broker, and is my agent in making purchases and sales. I have bought and sold many vacant lots within the last five years and own a number of lots in Hoboken in the vicinity of the approach to the North River Bridge, besides those in question in this case. I bought the five lots in question in the year 1891, from Fred N. Eberhard. I bought in all from him fifteen lots for $3,900, subject to large arrears of taxes, and assessments. I paid for these lots out of my own money, and have never sold them or received any payment for them. * * * My son George looks after my real estate business generally, but he has no interest in this property.

holders interested in the said company, and the title to the same taken in the name of Susan Luxton.

behalf, and denies that title to any lands has been taken in the name of Susan Luxton or Louisa C. Luxton for this defendant or its benefit, or by anybody in any respect, and more particularly the defendant saith that Susan Luxton has not purchased the five lots sought to be condemned either for this defendant or its benefit, and does not hold the title to the same for this defendant or its benefit, in any respect, *and that the said five lots were not purchased with moneys obtained from this defendant or from any one on behalf of this defendant under the authority, express or implied, of this defendant.* This defendant has no doubt, from information and belief, that the said Susan Luxton is the sole owner of the said five lots in good faith. At any rate, this defendant has had and has no interest whatever in the purchase of said lots for the said Susan Luxton, and if the condemnation proceedings are not set aside expects to obtain title therefor through the same upon payment of the condemnation moneys, and not otherwise.

9. The twelfth paragraph is already answered by what is said under the preceding head.

It will be noted that the denials of the bridge company do not follow the allegations of the petition, and

this neglect to deny or avoid specifically each allegation of the petition is suggestive. The eighth paragraph of the bridge company's answer does not deny in terms the arrangement between Gustav Lindenthal and George J. Luxton, set forth in the eleventh paragraph of the petition.

The allegation of the petition is that Gustav Lindenthal, an incorporator and the Chief Engineer of the North River Bridge Company, and interested in the company, is interested with George J. Luxton in purchasing property in Hoboken along the line. The answer denies that George J. Luxton has purchased property for the bridge company. That Geo. J. Luxton has been purchasing property along the line of approach under an arrangement with Lindenthal therefore stands admitted. Again, the allegation of the petition is, that lands so purchased have been paid for in whole or part by the bridge company *or the incorporators or stockholders of the company interested in its enterprise.* The denial is that the bridge company "or any incorporator or stockholder *on its behalf has paid for any such lands, with any moneys in whole or in part furnished by the North River Bridge Company, or on its behalf.*"

The negative pregnant here is apparent, as, if they had paid for such lands with moneys furnished by themselves, while at the same time interested in the bridge company, the identity of interest between the two sides to this law suit is apparent.

Again, the total absence of any denial of the allegations contained in the eleventh and twelfth paragraphs of the petition by any answer or affidavit filed on behalf of Susan Luxton, is conclusive.

Where is the affidavit of George J. Luxton, the agent

of both parties to this suit, who could deny these allegations if they could be denied?

Speaking of the five lots in question Susan Luxton says: "I paid for these lots out of my own money, and have never sold them or received any payment for them." This implied denial that the moneys purchasing these lots came from the North River Bridge Company, or stockholders or incorporators interested in it, leaves as admitted, through absence of any denial by Susan Luxton, the allegations set up in the eleventh paragraph of the petition, that under an arrangement between Lindenthal and Luxton other lands have been purchased and title taken in the name of Susan Luxton for and on behalf of incorporators or stockholders interested in the bridge company.

A careful analysis of the words of the answer of the bridge company and of the affidavit of Susan Luxton will convince the Court that the pleader imagines that so long as the North River Bridge Company *as a corporation* did not advance the moneys for these lands, or so long as its incorporators or stockholders did not purchase them *on its behalf and by its authority*, such facts would be an answer to the charge of collusion in this suit.

The reply to this is obvious. Under the decisions the Court pays no attention to the legal title in a matter of this kind, but if persons, through the ownership of stock in a corporation and individual ownership of the subject matter of the litigation, have practically become identified in interest in a pending litigation, or if they are so related by family or business relations as to press the suit with the object of obtaining a decision, which is desired by both parties, the suit is collusive, there is no real dispute, and the case should be dis-

missed. As showing the Court looks beyond the corporate titles to the parties interested in it by ownership of stock,

See

American Wood Paper Co. vs. Heft, 8 Wall., 333.

South Spring Gold Co. vs. Amador Gold Co., 145 U. S., 300.

As showing the effect of relationship of son and son in law and business interests,

See Lord vs. Veazie, 8 How. U. S., 251.

And if it is a fact that, as to these five lots sought to be condemned in this proceeding, Susan Luston is the owner and paid her money for them, the collusive character of the suit is still conclusively shown by the following facts: That the plaintiff and defendant are on friendly relations in other transactions involving title to real estate, so much so, that the stockholders of the defendant, selecting property along the line, purchase it and put the legal title in the paintiff; that this is done through plaintiff's son George J. Luxton, as agent, both for the plaintiff in error and defendant in error, and that this George J. Luxton has admitted this is a friendly suit, brought to get a decision that the bridge company can condemn land so that the company can go ahead on other lands without being enjoined (Brewster's Affidavit, p. 10).

When, to the labored frame of these denials of the bridge company so drawn as each to present a negative pregnant, we add the fact that Susan Luxton nowhere in her affidavit or any answer filed herein denies or attempts to deny these allegations, the charge of the petitioner is sustained in its entire scope and meaning

as showing that the relations between the parties interested in the North River Bridge and Susan Luxton are such, and their mutual interest in the lands in Hoboken is such, that there is no real dispute in this action.

The petition further sets up in paragraph thirteen as follows:

Petition.	Answer of Bridge Co.	Answer of Susan Luxton.
THIRTEENTH. Upon information and belief, *that thereupon the North River Bridge Company began the condemnation proceedings for the purpose of having a determination of the said law question* through the nominal plaintiff and defendant therein, *while in fact the said North River Bridge Company practically controls both sides of the said litigation* and *either itself or through its officers, stockholders or directors, and parties interested in the said company, has advanced all moneys necessary to carry on the said litigation on both sides and to pay the attorneys and counsel fees on both sides of the same.*	10. This defendant denies all the statements in the thirteenth paragraph of the petition.	Admitted by not being denied in any answer or affidavit.

The petition alleges, distinctly, that the costs of the litigation and counsel fees on both sides have been paid by the North River Bridge Company or by persons interested in it.

Susan Luxton is the plaintiff in error, and, presumably, ought to have herself personally paid the Clerk's fees for printing the record, etc., or, else, her attorneys did so. If not, who did pay them? Susan

Luxton and her attorney file each an affidavit herein. These facts, lying in the personal knowledge of one or the other of them, could have been denied or avoided, *if they were capable of being denied or avoided.*

THE NEGLECT, OMISSION OR REFUSAL *of Susan Luxton, George J. Luxton or Collins & Corbin to meet and answer this specific charge, is conclusive that the charge cannot be denied* BY ANY OF THEM. The absolutely worthless nature of the corporate denial thereby becomes apparent. The corporate denial may be true; and yet, if parties interested in this corporation have procured the bringing of this suit as a test case, and are paying all the expenses and counsel fees of both sides, the case is collusive.

The petition further sets forth, under paragraph fourteenth, that, in spite of the grave constitutional question involved, the plaintiffs and defendants in this case have twice submitted under the rule without argument in full court; and, as showing the connection of George J. Luxton with the case, and the fact that there is no real dispute between the parties, sets forth that George J. Luxton is the surety on the bond given by the plaintiff in error herein, and that the land owner waived an appeal to a jury on the value of the land, which allegations appear on the record and are admitted in the answer.

THE PETITION IS SUPPORTED BY THE SUPPORTING AFFIDAVITS OF JOHN T. M. BREWSTER AND LUDOVIC DAMAINVILLE.

The affidavit of Brewster chiefly relates to the position of the Luxtons in this litigation. It clearly proves that Susan Luxton has left the whole matter in the hands of her son George J. Luxton, and that George J. Luxton is the moving spirit in any defense that has been interposed by Susan Luxton herein. The answer of the North River Bridge Company admits (paragraph seventh) that "Susan Luxton is the mother of George J. Luxton, who is a real estate agent in Jersey City." The affidavit of Susan Luxton alleges:

"*My son George J. Luxton is a real estate broker and is my agent in making purchases and sales.* * * * *My son George looks after my real estate business generally, but he has no interest in this property.*"

These admissions are important in connection with the fact of the manner in which Susan Luxton attempts to meet the affidavit of John T. M. Brewster; and the fact, *that no answer or affidavit of George J. Luxton in contradiction of the facts alleged in the affidavits of John T. M. Brewster and Ludovic Damainville is presented on this issue.*

Brewster's Affidavit.

On the 18th day of October, 1893, I saw Mrs. Susan Luxton in her house, at No. 598 Palisade Avenue, Jersey City: I had a conversation with her, in the course of which the following occurred: I said to her, "Mrs. Luxton, are you the Susan Luxton who has a suit pending about the Bridge Company?" She answered, "Yes." I asked her, "What is the suit about?" She said, "I do not know anything about it; my son George attends to the whole business." I asked her, "Well, don't you know what it is you signed your name to?" And she said, "I leave it all to George." She further said that her son was George J. Luxton, the man who has an office next door.

Susan Luxton's Affidavit.

I have no acquaintance with John T. M. Brewster, whose affidavit in this matter has been read to me. I do not remember any such conversation as is stated in his affidavit. I did not tell him or any one that I knew nothing about this suit. I did know about it; but any one who comes to see me about buying or selling lots, I refer to my son, and I may have done so at the time stated, though I do not recall it.

THIS DENIAL of knowing nothing about the suit is a mere play upon words, for the question Brewster first asked her and her answer "yes," as related by him, shows that she knew about the suit *in that sense;* and the denial by Susan Luxton of this immaterial point makes all the more forcible the implied admissions arising from her neglect to deny Brewster's distinct allegation that she said, "My son George attends to

the whole business;" and that in answer to the question, "Well, don't you know what it is you signed your name to?" she answered, "I leave it all to George."

ON THE FACE OF THE PAPERS, THEREFORE, IT IS ADMITTED by Susan Luxton that George J. Luxton was her agent in this matter, and attended to the whole matter. On the face of the negative pregnant denials contained in the answer of the North River Bridge Company, the allegation in the petition that George J. Luxton, acting as the agent of Gustav Lindenthal, a party interested in the bridge had been buying real estate in Hoboken for parties interested in the bridge is admitted; and it is also practically admitted that Susan Luxton had become so much a party to this that title had been taken in her name to some of these lands.

ON THE FACE OF THE PAPERS, THEREFORE, IT APPEARS THAT THE BUSINESS INTERESTS OF SUSAN LUXTON, GEORGE J. LUXTON AND THE PERSONS INTERESTED IN THE BRIDGE PROJECT IN LANDS IN HOBOKEN ALONG THE LOCATION OF THE BRIDGE ARE PRACTICALLY ONE AND THE SAME; THAT THEY ARE ALL INTERESTED IN THE CARRYING THROUGH OF THE BRIDGE ENTERPRISE, WHEREBY FROM THE SALE OF THE LANDS THEY HAVE BOUGHT TO THE COMPANY THEY EXPECT TO OBTAIN PROFITS AND COMMISSIONS.

THUS THE COMMON INTEREST IN OBTAINING THE CARRYING OUT OF THE BRIDGE PROJECT IS CONCLUSIVE PROOF OF THE COLLUSIVE CHARACTER OF THIS SUIT.

If any further proof were needed we may resort again to the paragraphs of Brewster's affidavit which state in detail admissions made by George J. Luxton in regard to this suit, after he had thus been referred to her son by Susan Luxton.

Affidavit of Brewster.

On the 10th day of November, 1893, I met Mr. George J. Luxton at his place of business, 596 Palisade avenue, Jersey City, and had a conversation with him. In the course of the conversation *I asked him if he had been buying property for the bridge people, and he said yes.*

He took out a map and showed it to me, said map being a map showing a location of the bridge approach through Jersey City, and on the west side of the Hudson River, and containing a description of the property on the line and adjacent to the line of the bridge, some portions being marked with a little red line, the tracing being black.

He stated to me that the map was a map of a location of the bridge property. That the property marked with the red lines was property *that he had either purchased or got options on, in the interest of the bridge people. And he said that some of the options he had obtained were in the name of Mr. Lindenthal, chief engineer*, whose office is in William street, New York City. Then, after he had shown me this map, I said there was no use of getting parties interested in property over there if the bridge people were going to spend all their time in fighting in law courts, as there was one case on already—*the case of Luxton vs. The Bridge—and he said that that was a friendly action and was simply brought for the purpose of finding out the rights that the company would have under the charter, as the charter was very broad*, first for the purpose of finding their rights as to whether they could issue bonds; and, second, for the purpose of finding out what rights they have under the charter for the purpose of condemning lands. *He further said that the lower courts had decided the case* AS THEY WANTED IT, and that it was now gone up on appeal, and that there were 300 cases ahead of it, *and they expected to get the same decision there as the courts below had given.* In the course of the conversation, I stated to Mr. Luxton that I had parties who were desirous of purchasing property on the line of the location of the bridge if they could be reasonably assured of the true location, and that the bridge company was in good shape to win the pending suit, and that I had written out a letter for him to sign, stating the facts as he had stated them to me, which they desired to have signed before they took the trouble to come over and look at the property, and I then presented to him a letter, of which the following is a copy:

"GENTLEMEN—*I take pleasure in informing you that most of the property required for the bridge I have either personally purchased or have secured options thereon, in the interest of the bridge people. The suit now pending is entirely a friendly suit and will not jeopardize the advancement of the bridge. It is brought simply to determine the rights of the bridge charter* as to the acquiring of lands for the bridge people. *I know this, as my mother is plaintiff only for the nominal purposes of determining our rights by law.* All the property along the line of the bridge I know."

GEORGE J. LUXTON SAID "THAT THE LETTER WAS ALL RIGHT: THE FACTS STATED WERE SO, AND HE WOULD SIGN IT AND SEND IT TO ME. On the 24th day of January, 1894, I saw said George J. Luxton in relation to said matter again, and, in the course of the conversation, *he stated that he was practically the party in the suit which covered three lots down in the meadows*; that they got commissioners appointed to appraise the value of the lots; *that his lawyers immediately appealed the case*, and a decision was made by the Supreme Court saying that, before the proceedings could be brought, the commissioners must value the property. That the commissioners did value the property; that he formally objected to the valuation, and took

an appeal to the Supreme Court of the United States, and they expected a favorable decision in a few days. *That the reason this was done was because, under the charter, the company had a right to condemn lands, and they took this case as a test case, so that they could get a ruling of the Court, and prevent any other property owners getting injunctions against the company when they began to build*, and that there was another friendly suit pending in the Court of Appeals of the State of New York, which was brought to determine the right to issue bonds. Said Luxton then gave me the following letter:

JERSEY CITY, Jan. 24th, 1894.

DEAR SIR—In relation to the North River Bridge Company, that you make your inquiry concerning the Route to be taken, &c. I would say the route now confirmed by the War Department of United States cannot changed; the Company will commence work by July 1st, 1894; there is two question yet to be settle in by the court.

I remain,

Yours Resp't,

G. J. LUXTON.

I asked him to put in the letter the statement he had made to me that the suit was a friendly suit. He said, " I DON'T CARE TO DO SO, AS IT MIGHT COMPROMISE MATTERS."

Affidavit of Ludovic Damainville.

I called on George J. Luxton at his place of business on Palisade avenue, Jersey City Heights, during the month of November, 1893. * * *

He further stated or wrote that if my parties wanted to purchase some forty thousand dollars' worth of land upon which an option had been given to the bridge—option to run a year—that it would be a good investment, as when the bridge was built, which he thought wontd be built, the increase value would be a sure thing. He said there was a suit at law pending, but that there would be no trouble, as it was a friendly suit and would not affect the bridge interest, or words to that effect. He further said that the option he wanted to sell me had been procured by him for the bridge people, and was owned by them.

These two affidavits are not met by any opposing affidavits from either party to this suit.

Although George J. Luxton is admitted to have been the agent of Susan Luxton in this matter and is by implication admitted to have been the agent of parties interested in the bridge company in the purchase of other lands on the line, there is no affidavit of his produced explaining, denying or avoiding the allegations

of these affidavits, AND THESE AFFIDAVITS STAND ABSOLUTELY UNCONTRADICTED.

At the same time, the affidavit of Susan Luxton impliedly admits, and at any rate does not deny, that she referred John T. M. Brewster to her son for information in this matter.

Under such circumstances the admissions of George J. Luxton as to the character of this suit, its friendly nature, and the fact that he is practically the party in the litigation on the side of Susan Luxton, are unquestionably binding upon Susan Luxton; and thus upon the bridge company as co-defendant.

THE FACTS SET FORTH IN THE PETITION ARE THUS ABUNDANTLY PROVED. When in addition to this we add the affidavit produced by the petitioner, to show that Susan Luxton is a woman about eighty years of age, and the other affidavit of further admissions made by George J. Luxton, in regard to his connection with the North River Bridge enterprise and its promoters, the allegations of the petition are proved beyond all cavil.

It only remains to remark upon the ingenious drafting of the papers filed in answer to this motion.

Thus, the affidavit of Charles L. Corbin neglects to enlighten us upon the point by whom he was employed in 1892 to appear for Susan Luxton.

He says: "I am a member of the firm of Collins & Corbin, who were attorneys for Susan Luxton." * * * We were employed in February," etc. In view of the fact that there is here a specific charge that the North River Bridge Company, or parties interested in its project, employed and paid attorneys on both sides, this omission is significant. And Mr. Corbin's affidavit nowhere states, in answer to this charge, by whom he has been paid for his services, or by whom

he expects to be paid for them, or has a contract to get pay, or who paid the moneys for the printing of the record and briefs, etc.—all facts in his knowledge or the knowledge of his partner.

How easy, if the facts would bear disclosure, would it have been to have answered specifically denying this charge and setting forth the true facts.

Again, the alleged answer of the North River Bridge Company is verified in such a form that it is a practical nullity so far as it proposes to raise an issue which the Court should regard as such on an issue of this kind. In the first place, it is a mere corporate answer, and the affidavit of verification is made by three officers, who merely swear:

"*That all the matters and things therein stated are true to his own knowledge information and belief*" (Answer of North River Bridge Co., p. 6).

No details are given as to what denials are on knowledge, what on information and what belief, or as to which of the persons verifying this answer is acquainted with the particular facts charged or made inquiry as to them or any portion of them, and from whom. So far as appears these particular officers, except, perhaps Gustav Lindenthal, might all swear to this answer in this way, and yet each charge of the petitioner be true, the matter having been accomplished through other officers or agents. Again, the fact that Gustave Lindenthal swears to this affidavit in this way, when taken in connection with the guarded phraseology whereby this answer attempts to raise an issue as to certain allegations of the petition, is proof positive that the negative pregnant denials therein contained are intentional and not accidental, and thus portions of the charge remain unanswered, as above shown.

And the absence of any affidavit by Gustave Lindenthal denying matters in Brewster's affidavit that must be within Lindenthal's knowledge is further proof of the truth of those allegations.

Result of the Discussion.

This analysis of the papers upon this motion results in proving the existence of the following facts:

Parties interested as incorporators, officers or stockholders in the North River Bridge Company and hence in its enterprise have been engaged in real estate transactions in Jersey City along the line of the location of the bridge and have employed as agent for that purpose Geo. J. Luxton. Geo. J. Luxton has bought lands and options for these parties, and in some cases title has been taken in the name of Susan Luxton. George J. Luxton is the son of Susan Luxton and her agent in her real estate transactions. Susan Luxton and the bridge company have no dispute as to the value of these lands, and their alleged dispute as to whether the bridge company can condemn is a mere fiction concocted between George J. Luxton, as her agent, and the parties interested in the bridge company. The suit is friendly (Affdvt. of Brewster, pp. 10, 11) and collusive. Both parties to the suit desire the same decision, and have brought this suit to get it and to prevent future attack of other landowners on the bridge enterprise (Affdvt. of Brewster, pp. 10, 11).

The value of the lots in dispute does not warrant the litigation that has been had over them on the *academic question* of the right of the bridge company to condemn —*i. e.*, *academic* in view of the fact that the parties agree on the *value*. See the admission in affidavit of Corbin

that the value was too small to test this question (affidavit of Corbin, p. 4).

The counsel fees and expenses or printing the record, etc., incurred by Susan Luxton on this writ, have not been paid or incurred by her, but have been paid or incurred by stockholders, incorporators, officers or persons interested in the bridge company and its enterprise. Friendly relations of a business nature exist between the parties to this litigation and between the plaintiff in error and persons interested by ownership of stock or otherwise in the enterprise of the defendant in error in regard to lands in Jersey on this location, and it would be for the benefit of all parties to have a decision of the questions presented in one way.

In other words, all parties to this litigation desire and intend and are working for a decision in favor of the bridge company.

The friendly, collusive and fictitious nature of the suit is therefore fully established.

In Conclusion.

We beg to call the Court's attention to the fact that in cases where, upon a petition and opposing affidavits in a case of this description an issue has been made, it has been the practice of this Court to issue an order to show cause with a provision allowing the taking of testimony before a commissioner for and against the rule.

In this case the petitioner has merely been allowed to file affidavits.

In a case of this description all the evidence as to all the material facts going to prove the petitioner's contention is necessarily not in petitioner's possession, but in the power of the parties to the suit.

The petitioner has no power to compel them, their servants or agents, to make affidavit as to the facts they know in his behalf, and *the enormous difference in the possibility of extorting truth from an unwilling witness* by examination upon the stand, and by allowing him to prepare his answers in the form of an affidavit drawn under advice of counsel, is too self-evident to need further argument from us.

The foregoing analysis of the papers, pro and con, on this motion shows that there is no real issue to be tried —the material facts are all admitted and the consequences should follow.

If, however, this Court should be of the opinion that any further proof on behalf of the allegations of the petition should be submitted, we respectfully urge that there is but one way to get at the truth of the true inwardness of this suit, and that is to give leave for the taking of depositions, when the petitioner will have the power to put under oath the parties having personal knowledge of the transactions charged—transactions which have undoubtedly happened as alleged in the petition.

We also respectfully call the Court's attention to the rule that in cases of this description the petitioner is looked upon as "*amicus curiæ*;" that when the doubt is raised as to whether a suit is fictitious or not, the Court, jealous of its dignity in the premises, will itself take steps to ferret out the truth of the matter.

It remains only to add that if the petitioner has not conclusively proved that this suit is collusive and fictitious, such a *prima facie* case has been made out on the face of the papers that the petitioner should be given an opportunity to prove his allegations by legal evidence, given under the compulsion of a subpœna.

Wherever, upon a motion of this kind, the issue is left doubtful upon the papers filed, it is the practice of this Court to issue an order to show cause, and leave is given to both parties to take testimony, pro and con, before a Commissioner.

The American Wood Paper Co. vs. Heft, 131 U. S., XCII.

LAW.

POINTS.

I.

Wherever it is shown that the interests of both parties to the suit are one and the same, and not adverse, and that the suit is prosecuted to obtain a decision which both parties desire, the case is fictitious and will be dismissed on motion.

Lord vs. Veazie, 8 How., U. S., 222.
South Spring Hill Gold Co. vs. Amandor Medden Gold Mining Co., 145 U. S., 300.
Cleveland vs. Chamberlain, 1 Black, 419.
American Wood Paper Co. vs. Heft, 8 Wall., 333, and 131 U. S., XCII.

A.

In *Lord vs. Veazie* the plaintiff and defendant had executed a contract purporting to convey from Veazie to Lord 250 shares of stock of a railroad company, and Veazie further agreed: "And I further covenant with

the said Lord that the stockholders of said company have the right to use the waters of the Penobscot River within the limits mentioned in their charter for the purposes of navigation and transportation by steam or otherwise."

In 1846 the Legislature of Maine had granted to William Moor and Daniel Moor, Jr., their associates and assigns, the sole right of navigating the Penobscot River.

A reorganization afterwards took place, and the City Bank and John W. Veazie each claimed the sole control under the charter.

Lord brought an action on the foregoing covenant against Veazie, and the point at issue was that if the claim of the City Bank was valid the plaintiff was entitled to recover; otherwise, not.

The facts were stipulated, judgment given for defendant, and writ of error to this Court by plaintiff.

The parties submitted the case on printed briefs.

Moor and the City Bank then moved to be allowed to intervene, and to dismiss writ on the ground the suit was collusive.

The evidence of collusion submitted was the foregoing facts and proof that *Lord*, the plaintiff in error, was the son-in-law, and *Veazie*, the defendant in error, was the son of Samuel Veazie; and that a suit was then pending in the Maine Courts by petitioner against Veazie, involving the right to navigation of the river.

See 5th Point on Brief of Counsel for Petitioner, in report.

The Court held the suit fictitious—both parties to it having a common interest.

The language used is distinctly applicable to this

case: "*On the contray, it is evident that their interest in the question brought here for decision is one and the same, and not adverse; and that in these proceedings the plaintiff and defendant are attempting to procure the opinion of this Court upon a question of law, in the decision of which they have a common interest opposed to that of other persons who are not parties to this suit.*"

The value of the land being agreed upon, and the land being vacant meadow lots of small value, what else are these parties fighting for here except to obtain a decision in favor of the bridge company that will affect other parties?

B.

In Chamberlain vs. Cleveland, after a *bona fide* litigation below, the appellant from a judgment there got a friend to purchase the judgment and continued the suit in this Court in order to get a decision that would affect third parties.

The Court adopts the rule and language of the decision in *Lord vs. Veezie* and say:

"*Any attempt, by a mere colorable dispute, to obtain the opinion of the Court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended and treated as a punishable contempt of court.*"

Chamberlain vs. Cleveland, 1 Black, 419.

C.

In American Wood Paper Company vs. Heft, 8 Wall., 333, a bill had been filed by the paper company to enjoin defendants against infringement of paper company's patents and damages. The answer set up title to patents in defendants covering same art through one Dixon, one of the defendants. The bill was dismissed, and complainant appealed.

Pending the appeal, Dixon transferred one-half the Dixon patents to complainant, receiving 1,800 shares of stock in complainant company.

It was argued against motion to dismiss that the damages for alleged infringement set out in bill had not been compromised.

Held that this was immaterial, as the question of damages could only be arrived at by determining the issue as to the validity of the patents, and as to this the interests of both parties were now the same.

Case dismissed.

D.

In South Spring Gold Co. vs. Amador Gold Co., 145 U. S., 300, it appeared that pending the appeal "the control of both corporations, parties to this suit, had come into the hands of the same persons," but that there was a minority interest, and the suit was being prosecuted to determine their rights.

Held, the litigation had ceased to be between adverse parties, and the Court not only dismissed the writ but directed the judgment below to be reversed so as to conserve the rights of all parties.

II.

It is not required that the property interests of the two parties should be identical. It is sufficient that their business interests are the same, or that their ownerships or family relations are such as to lead both parties to desire the same result in the litigation.

Cases cited under Point I., *supra.*
Coxe vs. Phillips, Cas. Temp. Hardwicke, 224.
Barker vs. Todd, 15 Fed. Rep., 265.
Browne vs. Walker, 2 Showers, 406.

III.

A third party whose rights are affected will be heard on affidavits or other proofs outside of the record on a motion to dismiss an appeal in this Court.

Lord vs. Veazie, 8 How., U. S., 251.
Cleveland vs. Chamberlain, 1 Black, U. S., 419.
Little vs. Bowers, 134 U. S., 547.

IV.

Where the suit is fictitious, any one may move as amicus curiæ.

Coxe vs. Phillips, Cas. Temp. Hardwicke, 224.
In re R. J. Elsam, an Attorney, 3 Barnewall & Cresswell R., 597.
Barker vs. Todd, 15 Federal Rep., 265.
Browne vs. Walker, 2 Showers, 406.

V.

Wherever it is shown that the litigation is fictitious, and that the interests of the parties to the suit are practically the same so that the suit is amicably prosecuted to obtain a decision which both parties desire, the case will be dismissed.

Lord vs. Veazie, 8 How. U. S., 251.
Dakota Co. vs. Gledden, 113 U. S., 222.
Myer vs. Pritchard, 131 U. S., CCIX.
American Wood Paper Co. vs. Heft, 8 Wall., 333; 131 U. S., XCII.
South Spring Gold Co. vs. Amador Gold Co., 145 U. S., 300.

VI.

The motion is in time if made even after the argument on the merits.

Little vs. Bowers, 134 U. S., 547, 548.

VII.

The practice is to compel parties to the collusive suit to answer petition under oath or to answer under oath interrogatories propounded by the Court.

Coxe vs. Phillips, Cas. Temp. Hardwicke, 224.

In re R. J. Elsam, an Attorney, 3 Barnewall & Cresswell, 597.

In this Court, on the filing of the petition, notice issues to the parties in the collusive suit.

American Wood Paper Co. vs. Heft, 131 U. S., XCII.

If an issue is raised on the affidavaits presented on the motion, a rule to show cause issues with leave to parties to take testimony before a Commissioner for and against the rule.

American Wood Paper Co. vs. Heft, 8 Wall, 333.

Or the Court will refer it to a Master to take testimony and report.

In re R. J. Elsam, 3 Barn. & Cress. Rep., 597.

VII.

For the reasons stated above the motion should be granted.

Respectfully submitted,
JOSIAH M. VALE,
Counsel for John C. Crevier, Petitioner.

Office Supreme Court U. S.
FILED.
MAR 10 1894
JAMES H. McKENNEY,
CLERK

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

IN THE MATTER OF THE APPLICATION OF JOHN C. CREVIER TO BE ALLOWED TO INTERVENE IN THE CASE OF SUSAN LUXTON, PLAINTIFF IN ERROR, AGAINST THE NORTH RIVER BRIDGE COMPANY, DEFENDANT IN ERROR, NUMBER 1040, OCTOBER TERM, 1893, AND TO DISMISS THE WRIT OF ERROR THEREIN.

Answer to Petition.

JOSEPH D. BEDLE,

Counsel for North River Bridge Co.

J. H. PILSON, Printer, 74 and 76 Hudson Street, Jersey City.

Supreme Court of the United States.

OCTOBER TERM, 1893.

In the matter of the application of JOHN C. CREVIER to be allowed to intervene in the case of SUSAN LUXTON, plaintiff in error, against the NORTH RIVER BRIDGE COMPANY, defendant in error, Number 1040, October Term, 1893, and to dismiss the writ of error therein.

The answer of the North River Bridge Company to the petition of John C. Crevier, in the matter aforesaid, respectfully showeth:

1. That it has no knowledge of any of the statements in paragraph first of the said petition, except that the lot or tract particularly described in said paragraph is, in whole or in part, within the lines of the proposed approaches of the North River Bridge Company. Whether the said Crevier is the real owner of any of the lands described in said paragraph this defendant hath no knowledge, and cannot make any further answer to said paragraph except to call attention to the fact that the deed to said Crevier appears

from the petition to bear date December 19, 1893 pending the condemnation proceedings, and the writ of error in this court, and with a view, as this defendant charges, to obtain a standing and basis for this petition.

2. This defendant admits the statements of the second paragraph of the petition, but as qualified by the answer foregoing to the first paragraph.

3. The third paragraph is admitted.

4. The fourth paragraph is admitted, subject to the record, for entire accuracy.

5. In regard to the fifth, sixth and seventh paragraphs of the petition, that there are no questions of fact therein requiring any answer, and the character of the questions involved depends upon the record without any further reference to them in this answer.

6. In regard to the eighth paragraph of the petition this defendant denies all the statements therein. The same denial is made as to the statements in the ninth paragraph of the petition. In further answering the defendant saith that the suit referred to in the eighth paragraph is not fictitious or collusive in any sense, and that the interests of the parties thereto are not one and the same, and that while the suit as to procedure is not unfriendly, the dispute is real and bon fide. The condemnation proceedings were regularly taken by the North River Bridge Company, and without any arrangement or agreement on its part and Susan Luxton or on her behalf, and the

writ of error was sued out of her own act. The said company, at the request of its counsel, consented to facilitate the procedure in order that a speedy determination might be reached, but beyond that there is no arrangement whatever on the part of the said company with reference to the suit.

7. The defendant denies that Susan Luxton is a merely nominal plaintiff in the suit, but believes that she is the mother of George J. Luxton, who is a real estate agent in Jersey City. The defendant, in this connection, would also state, that it is informed and believes that John C. Crevier is a rival real estate agent to said Luxton in the city of Hoboken.

8. In answer to paragraph eleventh, the defendant saith that Gustave Lindenthal is an incorporator named in the charter of the North River Bridge Company, and is the Chief Engineer of said company, but he is not and never has been a director of the said company. The President of the said company is Jordan L. Mott, an iron manufacturer of New York City, and has been President ever since its organization. The Vice-President is Edward F. C. Young, the President of the First National Bank of Jersey City. Mr. Young has also been Vice-President since its organization. Charles J. Canda, former Assistant-Treasurer of the United States, is the Treasurer, and has been from the organization and resides in the City of New York.

In further answering paragraph eleventh, the defendant saith that no property has been pur-

chased in the City of Hoboken by George J. Luxton for or on behalf of this defendant, and denies that the North River Bridge Company, or any incorporator or stockholder on its behalf, has paid for any such lands with any moneys, in whole or in part, furnished by the North River Bridge Company, or on its behalf, and denies that title to any lands has been taken in the name of Susan Luxton or Louisa C. Luxton for this defendant or its benefit, or by anybody in any respect, and more particularly the defendant saith that Susan Luxton has not purchased the five lots sought to be condemned, either for this defendant or its benefit, and does not hold the title to the same for this defendant or its benefit, in any respect, and that the said five lots were not purchased with moneys obtained from this defendant or from any one on behalf of this defendant under the authority, express or implied, of this defendant. This defendant has no doubt, from information and belief, that the said Susan Luxton is the sole owner of the said five lots in good faith. At any rate this defendant has had and has no interest whatever in the purchase of said lots, for the said Susan Luxton, and if the condemnation proceedings are not set aside expects to obtain title therefor through the same upon payment of the condemnation moneys and not otherwise.

9. The twelfth paragraph is already answered by what is said under the preceding head.

10. This defendant denies all the statements in the thirteenth paragraph of the petition.

11. In answer to the fourteenth paragraph of the petition, the defendant refers to the records of this case on both writs of error in this Honorable Court, and to the action of the parties therein under the twentieth rule, and also to the briefs, for such action as has been taken, and arguments made. This defendant is undoubtedly interested in a speedy determination of the case by reason of the great interests involved, and its counsel has, with the wish of this defendant, been authorized to do whatever was fair and proper in the course of practice to facilitate the speedy hearing and adjudication of the case.

12. The defendant admits the averments in paragraph fifteen of the petition. These distinctly appear upon the face of the record.

13. This defendant in further answering denies that there exists any collusion, fraud, or complicity between the parties to the said suit and condemnation proceedings, or that the interests of the said parties are the same or in common, or that any effort whatever has been made to deal with this Honorable Court otherwise than fairly with a view to a correct judicial determination of the real controversy between them as it appears upon the record, and which controversy is entirely real and in good faith. The defendant also denies that the complainant is entitled to any relief as prayed for in the petition or otherwise, and that said petition should be dismissed as most unjustly founded, with costs.

Witness the signature of the President, and the seal of the defendant, attested by the Secretary Pro

Tem. this eighth day of March, A. D. eighteen hundred and ninety-four.

JORDAN L. MOTT,
President.

[SEAL.]

Attest:

JNO. G. CURELL,
Secretary Pro Tem.

JOSEPH D. BEDLE,
Council of Def't.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

The answer of the North River Bridge Company foregoing was taken this eighth day of March, in the year eighteen hundred and ninety-four, before me under the Common Seal of the said corporation, as by their said seal thereto affixed appears.

CHAS. F. WELLS.
Notary Public,
New York County.

[SEAL.]

UNITED STATES OF AMERICA,
State of
County of } ss.

JORDAN L. MOTT, the President, CHARLES. J. CANDA, the Treasurer, and GUSTAVE LINDENTHAL, the Chief Engineer, of the North River Bridge Company, being each duly sworn on his oath saith; That he is familiar with the contents of the foregoing answer, and that all the matters and things therein stated are true to his own knowledge, information and belief. Each also

saith that the seal foregoing is the seal of the Company duly affixed.

JORDAN L. MOTT,
C. J. CANDA,
G. LINDENTHAL.

Sworn and subscribed before me this 8th day of March, A. D., 1894.

CHAS. F. WELLS,
[L. S.] *Notary Public*,
New York County.

UNITED STATES OF AMERICA,
STATE OF NEW JERSEY,
COUNTY OF HUDSON, } ss.:

EDWARD F. C. YOUNG, the Vice-President of the North River Bridge Company, being duly sworn on his oath saith, that the matters and things set forth in the foregoing answer are true to the best of his knowledge, information and belief.

E. F. C. YOUNG.

Sworn and subscribed before me, this eighth day of March, A. D., 1894.

[SEAL.] J. D. BEDLE, JR.,
Notary Public of New Jersey.

Office Supreme Court U. S.
FILED.
MAR 24 1894
JAMES H. McKENNEY,
CLERK.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1893.

IN THE MATTER OF THE APPLICATION OF JOHN C. CREVIER TO BE ALLOWED TO INTERVENE IN THE CASE OF SUSAN LUXTON, PLAINTIFF IN ERROR, VS. THE NORTH RIVER BRIDGE COMPANY, DEFENDANT IN ERROR, NO. 1040, OCTOBER TERM, 1893, AND TO DISMISS THE WRIT OF ERROR THEREIN.

BRIEF OF J. D. BEDLE,

Counsel for the North River Bridge Company.

J. H. PILSON, Printer, 74-76 Hudson Street, Jersey City.

Supreme Court of the United States.

OCTOBER TERM, 1893.

In the matter of the application of JOHN C. CREVIER to be allowed to intervene in the case of SUSAN LUXTON, plaintiff in error, *vs.* THE NORTH RIVER BRIDGE COMPANY, defendant in error, No. 1040, October Term 1893, and to dismiss the writ of error therein.

Brief of J. D. Bedle, Counsel for the North River Bridge Company.

I did not intend to present any Brief in this matter, but relied upon the oral argument already made before this Honorable Court in connection with the answer to the petition. Inasmuch, however, as a long Brief has just been submitted to me from the petitioner, I beg leave to make a few suggestions in reply.

Leave was granted to the petitioner, to serve affidavits in reply to the answer, but he has not availed himself of that privilege.

The answer of the Bridge Company is full and complete, and although taken under the seal of the corpor-

ation, is definitely sworn to by those Officers who must necessarily know all about the facts. Jordan L. Mott, the President, Charles J. Canda, the Treasurer, and Gustave Lindenthal, the Chief Engineer, who are familiar with the contents of the answer, each swears that all the matters and things therein stated *are true to his own knowledge, information and belief.* This statement excludes any possibility of a different state of facts within their knowledge, information and belief. The personal knowledge, information and belief of each of those Officers, is invoked for the truth of the answer. The Treasurer of course knows what moneys are paid out. The President is also presumed to know and can satisfy himself as to any deficiency of knowledge, and Mr. Lindenthal, the Chief Engineer, who seems to be the objective point of attack in the Petition, knows exactly what he swears to in the answer. Mr. Young, the Vice-President, swears to the best of his knowledge, information and belief. The others are necessarily more particularly informed than he, but his affidavit is very strong for it could not be taken by a person of his standing without implicit confidence in the truth of the answer. The Petition is sworn to by John C. Crevier, the petitioner only, to the best of his knowledge, information and belief. Most of it is made up of hearsay. How it is possible for a corporation to answer more distinctly and definitely under oath than this Company has done, it is hard to conceive. I invite special attention to the structure of the Petition and the affidavit of Crevier, to see how little there is in it, which may be regarded as a distinct statement of facts. For instance, I call attention to the thirteenth paragraph of the petition

which contains among other things a statement that The North River Bridge Company controls both sides of the litigation and that it has advanced the money necessary to carry on the litigation on both sides &c. This is entirely upon information and belief. Paragraph 10 of the answer denies all the statements in this thirteenth paragraph. Please do not fail to see the force of this denial. The President, the Treasurer and the Chief Engineer know whether the statements of the thirteenth paragraph are true or not, and they deny them absolutely. I respectfully ask that the Petition and the Answer be read side by side, so as to show distinctly how complete the Answer is. There is no disguise in making the answer or any effort as claimed in the Petitioner's brief, to create negative pregnants, or to deal with the Petition otherwise than candidly and thoroughly.

The circumstances under which the Petitioner acquired a Deed for the property mentioned in the Petition do not appear. It is sufficient however to say that the Deed bears date December 19, 1893, a very recent date and pending this Writ of Error. Such a person asking to dismiss a case in which he is not a party, should present strong proofs, if permitted at all. Still without denying the right of the Court to protect itself from imposition, I respectfully insist that the standing of the Petitioner does not entitle him to the favorable consideration of the Court.

According to the evidence, Mrs. Luxton is the owner of the five lots in question, having paid for the same with her own money and the title standing in eer own name. In that situation the Bridge Company commenced condemnation proceedings, not own-

ing the property nor having any interest therein. This is the clear proof. The interests of the parties are adverse and while the North River Bridge Company has been willing to facillitate the proceedings upon Writ of Error so that a speedy determination may be reached, there is nothing of a collusive nature in this litigation. The Company ought not to be tied up longer than necessary, and I am yet to know that a friendly arrangement as to procedure only, constitutes a collusive suit.

This whole proceeding on the part of Mr. Crevier, shows an *ulterior* and unfair effort, with the loosest kind of hearsay evidence through the agency of witnesses acting the part of Detectives, to pervert the true *status* of the parties to the case. The North River Bridge Company was incorporated by Act of Congress with full powers to bridge the Hudson and it may not be difficult to conceive, in view of the public notoriety of the legislation that has been sought in Congress for the last year or two in other interests, but not obtained, what the ulterior motive of this proceeding may be.

We respectfully submit that there is no proof whatever worth consideration, that the suit is collusive, but on the contrary the evidence of the parties is clear that the controversy is real and bona fide.

J. D. BEDLE,

Counsel for The North River Bridge Company.

Dated March 21, 1894.

Office Supreme Court U. S.
FILED.
MAR 12 1894
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

In the Matter of the Application of JOHN C. CREVIER to be allowed to intervene in the case of SUSAN LUXTON,
Plaintiff in Error,
vs.
THE NORTH RIVER BRIDGE COMPANY,
Defendant in Error.

No. 1040.

Affidavits for Susan Luxton.

GILBERT COLLINS,
Attorney and Counsel,
Jersey City, N. J.

A. J. DOAN, Law Printer, 54 Montgomery St., Jersey City.

United States Supreme Court.

SUSAN LUXTON,

Plaintiff in Error,

vs.

THE NORTH RIVER BRIDGE COMPANY,

Defendant in Error.

DISTRICT OF NEW JERSEY, ss.:

SUSAN LUXTON, being duly sworn, says, I am the plaintiff in error in the above entitled cause; I reside in Jersey City and have lived there over forty years and have bought and sold real estate during the last thirty years; my son George Luxton is a real estate broker and is my agent in making purchases and sales. I have bought and sold many vacant lots within the last five years and own a number of lots in Hoboken in the vicinity of the approach to the North River bridge besides those in question in this case. I bought the five lots in question in the year eighteen hundred and ninety-one from Frederick N. Eberhard; I bought in all from him fifteen lots for thirty-nine hundred dollars, subject to large arrears of taxes and assessments. I paid for these lots out of my own money and have never sold them nor received any payment for them. I authorized Collins & Corbin to appear for me in the condemnation case of the North River Bridge Co., and to do what was necessary in

the matter. My son George looks after my real estate business generally but he has no interest in this property. I authorized the case to be taken to the United States Supreme Court to determine whether the Bridge Co. could take my lots.

I have no acquaintance with John T. M. Brewster, whose affidavit in this matter has been read to me. I do not remember any such conversation as is stated in his affidavit. I did not tell him or any one that I knew nothing about this suit. I did know about it, but anyone who comes to see me about buying and selling lots I refer to my son and I may have done so at the time stated, though I do not recall it. I am not a fictitious or nominal party to this suit, and I have not made or authorized any arrangement about the suit except to authorize my counsel to proceed with the case and look after my interest in a proper manner.

SUSAN LUXTON.

Sworn to and subscribed at Jersey City this 6th day of March, 1894, before me.

JOHN J. MULVANEY,

[L. S.] Notary Public of New Jersey.

UNITED STATES SUPREME COURT.

SUSAN LUXTON,

Plaintiff in Error,

against

THE NORTH RIVER BRIDGE COMPANY,

Defendant in Error.

DISTRICT OF NEW JERSEY, ss.:

CHARLES L. CORBIN, being duly sworn, says: I am a member of the firm of Collins & Corbin, who were attorneys for Susan Luxton in the proceedings brought up for review by the writ of error in this cause, and I had charge of those proceedings and assisted my partner, Gilbert Collins, in the preparation of the case on this writ of error, and on a former writ of error, dismissed as prematurely brought. We were employed in February or March, eighteen hundred and ninety-two, to appear in the United States Circuit Court on notice to condemn, which was served, and resist the application, and if it was granted to ask for the appointment of satisfactory commissioners. I appeared in the Circuit Court and raised without suggestion of anyone else, a question of the constitutionality of the statute, before Judge Acheson. The Court ruled against me on the spot, without examining my authorities, on the authority of a decision of Judge Bradley, in the case of Stockton against the Baltimore and New York Railroad Company, which was the case of a bridge crossing Staten Island Sound. I then had a

conversation with the counsel for the company, and canvassed the names of commissioners and in the conversation I told him that I thought that the Judge had made altogether too easy a question of the constitutionality of the grant of power to condemn, and that if it were not that the value of the lots was too small to warrant a costly litigation, I would take a writ of error to the United States Supreme Court. Mr. Bedle, the counsel for the company, said that he would be very glad if we would take a writ of error, and that if we would do so he would aid us to make the issue simple, and have the case submitted on briefs. This suggestion by me was the first suggestion of a writ of error to the United States Supreme Court. I presented the matter to my client and was authorized to proceed and take a writ of error, and have proceeded accordingly. Our firm had no complicity in any way with the North River Bridge Company, its counsels or attorneys in this matter. We were employed to look after the interest of our client, Mrs. Luxton, which we did without any regard whatever to the interest of the North River Bridge Company, and without any understanding with them, except the arrangements made with their counsel to simplify and expedite the procedure.

CHARLES L. CORBIN.

Sworn to and subscribed at Jersey City this 7th day of March, A. D., 1894, before me.

JOHN J. MULVANEY,
[L. S.] Notary Public of New Jersey.

Office Supreme Court U. S.
FILED.
MAR 24 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

In the Matter of the Application of JOHN C. CREVIER to be allowed to intevene in the case SUSAN LUXTON,

Plaintiff in Error,

vs.

THE NORTH RIVER BRIDGE COMPANY,

Defendant in Error,

No. 1040.

Argument for Susan Luxton.

GILBERT COLLINS,
Attorney and Counsel,
Jersey City, N. J.

A. J. DOAN, PRINTER, 54 Montgomery Street, Jersey City.

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 1040.

In the matter of the application of JOHN C. CREVIER to be allowed to intervene in the case of SUSAN LUXTON, *Plaintiff in Error.*

vs.

THE NORTH RIVER BRIDGE COMPANY, *Defendant in Error*, No. 1040, October Term, 1893; and to dismiss the Writ of Error therein.

ARGUMENT FOR SUSAN LUXTON.

Counsel for petitioner has sent me a printed argument, to which I beg leave briefly to reply:—

Counsel criticises the absence of any affidavit by George J. Luxton. I explained to the Court when the motion was heard orally, that I had ascertained on inquiry that Mr. Luxton was in Florida and would not return for some weeks. Besides, in view of the affidavit of Susan Luxton, the party in interest, responsive to all material allegations, sworn to, affecting her, it was not essential that she should bring her son to deny or explain alleged statements of his. They are immaterial and hearsay.

Counsel further criticises the lack of denial of the vague general charges made in the petition but not supported by any proof. The only matters of fact which can possibly be pertinent to the case as made by petitioner's *affidavits* are met by the affidavits of Mrs. Luxton and Mr. Corbin.

Mrs. Luxton has a right to require her property to be lawfully condemned and to raise every legal and constitutional question. That her son may have business relations with persons interested in the bridge company has no bearing on the case. He could *himself* resist a condemnation of his own lands if he chose. Surely the existence of such relations (even if proved) cannot deprive his mother of her legal rights.

If the statements attributed to the son are strictly true, they cannot benefit petitioner. There is a vast difference between a "*friendly*" suit and a *collusive* one. Petitioner's counsel cites a very good instance of the latter, in Lord v. Veazie, 8 Howard U. S., p. 251, where the *contract* was undoubtedly made to bring about indirectly an adjudication which would control the Court's insubsequent litigation, which persons not parties to that suit would probably have to meet. The case was like the famous one of Aaron Burr, who, desiring to get the opinion of the Court on the language of an old deed, under which (or against which) he claimed title to very valuable property—caused a deed for a lot of land of trifling value to be made to a nominal vendee, inserting the identical language he wished construed. Then he brought a suit in which he controlled both sides of the litigation and of course presented vigorously that side which he wished to have prevail. In the present case Mrs. Luxton owned her property before the route of the bridge was located. She was not compelled to sell it and has not sold it, and although the Act of Congress

does not, as do some Statutes, require a failure to agree as a pre-requisite to condemnation—the proceedings brought up by the writ of error show that the bridge company could not agree with her on the price of her land. Now in such a posture of affairs, what principle of law or judicial administration forbids a "*friendly*" procedure merely?

It is established by the affidavits put in on the part of Mrs. Luxton that she is the absolute owner of the five lots in question (part of a much larger tract); that she paid for them with her own money; that her son George has no interest whatever in this property; that she is not a fictitious or nominal party to the suit and has not made or authorized any arrangement about the suit except to authorize her counsel to proceed with it and look after her interests in a proper manner. Also that there is no complicity on the part of her counsel with the North River Bridge Company, its counsel, or attorneys, and that her counsel were employed to look after her interests, which they have done, without any regard whatever to the interests of the North River Bridge and without any understanding with them except the arrangement made with their counsel to simplify and expedite the procedure as stated in the affidavit of Mr. Corbin. How charges of complicity and bad faith can be more strongly controverted it is difficult to see.

The petitioner alleges that he is the owner of land similarly circumstanced with that of Mrs. Luxton; that he is fearful that Mrs. Luxton's counsel will not fully and fairly present the constitutional objections to its condemnation, and that he wants a full Bench to hear the argument. I offered in open Court and now offer him the privilege to submit an argument in favor of the point taken by Mrs. Luxton as plaintiff in error, and I assume that all the arguments will be considered by the full Bench of this Honorable Court.

This is all that any one occupying the position of petitioner ought in good faith to desire. The fact that the petitioner asks more indicates that he—himself a real estate agent, who only acquired title to his land December 19th, 1893 (see his petition, page 2) after the issuance of the writ of error in this case—has some ulterior motive in the present application. He comes in pending the litigation with no pre-existing rights.

Respectfully submitted,

GILBERT COLLINS,

Counsel for Susan Luxton.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1893.

TERM NO. 1040.

SUSAN LUXTON,
Plaintiff in Error,

vs.

THE NORTH RIVER BRIDGE COMPANY,
Defendant in Error.

BRIEF ON BEHALF OF JOHN C. CREVIER.

FILED BY LEAVE OF COURT.

Preliminary Statement.

The parties to this cause had already submitted the case on briefs under the 20th rule, when John C. Crevier, the owner of a plot of land and buildings in Hoboken, worth about $70,000, which is included in and affected by the location of the route of the North River Bridge Company, petitioned this Court to be allowed to intervene, and to dismiss the writ of error herein, on the ground that the suit was fictitious, collusive, etc.

Answers were filed and the Court denied the petitioner's application, but granted him leave to file a brief on the main question.

This brief is filed in pursuance of this permission.

FOR THE LENGTH OF THE BRIEF NOW FILED COUNSEL FOR CREVIER RESPECTFULLY APOLOGIZES, AND ASKS THE INDULGENCE OF THE COURT ON THE FOLLOWING GROUNDS :

1st. The case now presented is *a constitutional question of the first importance, squarely presented for the first time.*

2d. The claim of Congressional powers, made on behalf of the Bridge Company, is far in excess of any of the powers heretofore sustained under the decisions of this Court or heretofore attempted to be conferred by Congress.

3d. *The North River Bridge Act is an* INNOVATION *upon the practical construction of the Constitution which has prevailed for a century.*

4th. The arguments filed by both sides on this novel and important constitutional question, *one never before presented to or passed upon by this Court,* are so meagre that the Brief for the North River Bridge Company occupies four pages and that for Susan Luxton eight.

5th. *In consequence, there has been thrown upon the counsel for the petitioner the entire burden of fully presenting the arguments and authorities in point.*

Counsel for *Crevier* respectfully *request the special attention of the Court* to the following portions of the argument, viz. :

Part I., discussing the clear distinction between this case and the others heretofore decided (pp.).

The portions of Part II. discussing the meaning in 1789 of the words used (pp.).

Part III., containing the history of the practical construction of the clause (pp.).

Facts of the Case.

THE NORTH RIVER BRIDGE COMPANY is alleged to be incorporated under Chapter 669 of the Laws of the 51st Congress passed July 11, 1890 (Rec., p. 4).

By this act Congress purports to grant to certain individuals named *a corporate being and the power to construct a bridge* across the Hudson River, at New York City, *with the right to condemn land* for the purpose.

THE NORTH RIVER BRIDGE COMPANY, so created, has located its route, and brought proceedings to condemn the land of SUSAN LUXTON.

SUSAN LUXTON has defended, on the ground *that Congress has no power to confer upon a corporation the right to condemn lands.*

The Court below granted condemnation in favor of the NORTH RIVER BRIDGE COMPANY, and against SUSAN LUXTON.

SUSAN LUXTON brought this writ of error, *and the parties submitted the case under the 20th Rule.*

Preliminary Point.

A.

THE BRIEFS *filed on behalf of both* PARTIES to the record ADMIT AWAY one of the strongest points of Susan Luxton's case.

Mr. Bedle's argument assumes that it is not denied that the corporation is lawfully created by the Act of Congress.

Mr. Collins confines his brief to the single point :

" Congress cannot confer the right of Eminent Domain upon a private company to take land for a bridge."

This point he argues admirably and we, therefore, do not discuss it in this argument.

B.

The Real Issue.

The true question is not :

"Can Congress authorize a private company to condemn land ?"

But :

" CAN CONGRESS CARRY ON THE BRIDGE BUSINESS ? "

The question as presented in terms is : " Can Congress incorporate a company to build a bridge ? " But this results in the question above stated ; and further ends in the question : " *Can Congress engage in all kinds of interstate commerce ?* "

ARGUMENT.

ARTICLE X. of the United States Constitution prescribes "*the powers not granted to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.*"

The power of Congress over any subject matter must, therefore, be found within the four corners of the Constitution. There is no pretense that there is anywhere in the Constitution any express grant to Congress of the power—

"A," to create a corporation; or,

"B," to engage in interstate commerce;

and hence, there is no express grant of the right to build a bridge, or to incorporate a company for that purpose.

The burden is, therefore, thrown upon the North River Bridge Company to show that the act creating that corporation is included within some one of the implied powers of Congress.

Those who have claimed the existence of a power in Congress to bridge streams have sometimes attempted to sustain it under the express grant of the power "to establish post-offices and post-roads," but the assertion is clearly erroneous for the reasons now stated.

In the first place, the power to establish post-offices and post-roads is a power limited to those purposes, and neither can be established under this grant, when the main purpose of the grant is not to subserve the purposes of the mails of the United States, but to carry on the business of a common carrier in the general transportation business.

The United States is a corporation which has the

exact powers and no others granted to it in express terms by its charter—the Constitution.

To hold that under the grant of the right to establish post-offices and post-roads the United States can engage in the general business of common carriers, as a railroad, bridge or canal or express company, incidentally carrying mails, would be to reverse a whole line of consistent decisions as to the construction of grants of power to corporations.

It would, in addition, be a stride towards State Socialism and Paternalism that the makers of the Constitution never dreamt of when they used that language.

Thus Justice GRIER, in referring to this power, says:

"Congress may establish post-offices and post-roads, but this does not affect or control the absolute power of the State over highways and bridges."

Milnor vs. New Jersey R. R. Co., Vol. 16, U. S. Sup. Ct. Rep., Lawy. Ed., 799, 806.

And *Justice* WAYNE, referring to the power in the Wheeling Bridge case, says:

"Nor does the power of Congress to establish post-offices or post-roads give any power to Congress to do more between the States, or within the States, than to declare the routes for carrying the mails upon roads already existing, and to designate the localities upon those roads where post-offices shall be kept for the delivery and transmission of letters, and other things or parcels which Congress may declare mailable."

Pennsylvania vs. Wheeling Bridge Co., 18 How., 421.

Although these are dissenting opinions, the construction thus claimed is not dissented from by the majority, who base their conclusions upon other grounds.

In the brief filed by the counsel for The North

River Bridge Company no serious claim is made under any other grant of power save that to regulate commerce.

The argument runs in this fashion :

Congress can regulate commerce.

It can prohibit a bridge as interfering with traffic by water; hence, it can create a bridge as promoting traffic by land.

And, being entitled to create a bridge, it can do so by an agent, and can create a company for the purpose.

Thus, by an easy transition of judicial legislation, the express power "*to regulate*" commerce becomes an implied power "*to create or engage in commerce.*"

Let us examine this alleged power.

FIRST. *In the light of the principles involved, the language, its construction, true meaning and results.*

SECOND. *In the light of the contemporaneous construction of the Fathers. The history of the clause.*

THIRD. *In the light of the decisions.*

But, at the outset, it is claimed that this Court is already committed to the doctrine that Congress has power to build railroads, bridges, etc.

It is necessary, therefore, to deal with this question first.

PART I.

I.

This Court is not committed to the rule that Congress has the power to build turnpikes, railroads or bridges.

The cases cited by counsel for the bridge company are not authorities in point.

It is admitted that language used in the opinions bears out the claim; but it is insisted that, on other valid grounds, the cases were correctly decided.

The cases cited to sustain this contention are:

California vs. Pacific Railroads, 127 U. S., 1, 39.
Cherokee Nation vs. Kansas Rwy Co., 135 U. S., 641.

On investigation these will be found to be mere *dicta* resting largely upon certain rulings in the opinion of Mr. Justice BRADLEY in Stockton vs. Baltimore & N. Y. R. R. Co., 32 Fed. Rep., 9, when sitting as a Circuit Court—which rulings were not necessary even for that decision. As hereafter shown, all these decisions may be admitted to be sound law, yet all the grounds given for the particular decisions made are not valid when attempted to be enforced as sustaining the alleged rule with reference to the totally new and different combination of facts presented in this case.

In *California vs. Pacific Railroads*, 127 U. S., 1, Justice BRADLEY declared that Congress had the power to construct or authorize individuals or corporations to construct national highways and bridges from State to State (27 U. S., 39).

This was a dictum.

In the first place the tax act whose constitutionality was questioned, and whose validity was the only point in the case, required the State Board of Assessors to include in their assessment steamers engaged in transportation across waters dividing a railroad, and had *for this reason been held to be unconstitutional by the Supreme Court of California*; viz., on the ground that steamboats under the Constitution were assessable by the County Boards and not by the State Board.

This Court merely followed the State's decision in holding the act unconstitutional.

What was said about the powers of Congress to charter such corporations was, therefore, unnecessary, and outside of the grounds of the decision.

Again, the question was not involved for another reason.

Assuming that the validity of a franchise tax was involved, and that that franchise was derived from the United States, what was said in regard to Congressional powers was still not necessary to the decision.

The *Central Pacific Company*, as to which the question was raised (127 U. S., 35), was a State corporation (*Id.*), and was merely empowered by Act of Congress to extend its road to a junction with the Union Pacific in another territory (*Id.*, 36).

The question involved, therefore, even under this view, was the right of California to levy a franchise tax (assessed against the entire franchises as a unit), on a corporation engaged in commerce between a State and a territory (Congress having an undoubted right to create a corporation in a territory—because over a territory it has all the powers of a State legislature).

Under such facts it is apparent that the right of

Congress to charter bridges or railroads *in the sense in which it is involved in this case*, was not in issue.

As to that portion of the *Central Pacific* franchises to be exercised in the Territories until its extension to and connection with the Union Pacific, Congress unquestionably had the rights of a sovereign state.

Now, it had already been decided by this Court that where a franchise had been jointly derived from two States (namely, a ferry between the two) that a tax by one State upon the whole franchise of a corporation so engaged in interstate commerce was invalid.

> Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196.

The California railroad tax cases are therefore clearly distinguishable, and the question now at issue was not in any sense necessary to their decision.

In *The Cherokee Nation vs. The Southern Kansas Railway Company*, 135 U. S., 641, Justice HARLAN cited the opinion of Justice BRADLEY in *Stockton vs. The Baltimore and New York R. R. Co., 35 Fed. Rep., 9, 19*, with approval, and therein declared that Congress had the right to authorize a railroad company to condemn land situated in the Cherokee Nation in a Territory of the United States, and stated *arguendo* that Congress had the right to do so in the States themselves, and therefore in the Territories and Indian Nations.

This also was *a dictum*. The decision only involved the question of the right of Congress over the Territories.

There was no necessity of dragging in the State rights question, since Congress has admitted rights over the Territories similar to the powers of a State Legislature over a State.

The assertion of a right over the States in this respect was, therefore, not necessary to the decision.

What was said by Mr. Justice BRADLEY in Stockton vs. The Baltimore & N. Y.R. R. Co., 32 Fed. Rep., 9, is also a *dictum* as applied to the distinguishing facts in this case.

In that case the act of New Jersey which was declared unconstitutional was a regulation of commerce prohibiting land intercourse between the States, and was therefore void when opposed to the Congressional regulation allowing freedom of such intercourse.

In that case Congress had merely declared " it shall be lawful " for the New York, etc., R. R. Company to construct a bridge across the Kill von Kull.

In the first place, no question of the power of Congress to condemn lands for the purpose was involved. The lands up to the New Jersey shore line were owned by a consenting New Jersey railroad company, *and only the title of the State in lands under water was involved.*

On this ground the Court expressly refused to pass on the question of the power of Congress to exercise eminent domain under the circumstances (a refusal which is sustained by the principle of the late decision of this Court in the Chicago Lake Front Case

Illinois Central R. R. Co. vs. State of Illinois, 13 Sup. Ct., Rep. 110.,

by a very close vote).

In the second place, no corporation had been created by Congress ; and, therefore, the question of the power of Congress to incorporate a company for the purpose of building a bridge was not involved.

BUT A DEEPER, BROADER AND MORE FUNDAMENTAL DISTINCTION EXISTS.

In the *Kill von Kull* Bridge Case, New Jersey, by enacting a law that no one should bridge the navigable waters bounding her shores, had prescribed a regulation of commerce--had prohibited intercourse between the States.

Congress, by declaring that it should be lawful for the New York Elevated R. R. Co. to construct a bridge across the *Kill von Kull*, had, at most, prescribed a regulation of commerce—had nullified such restraint.

The fact that the party permitted by Congress to engage in commerce with New Jersey in a particular way was a corporation, was an *accident*, not an *essential*.

Had any other citizen of New York—as Erastus Wiman—been named, the regulation would have been equally valid, and no corporate franchise been involved.

The point we draw special attention to is that *the Act of Congress involved in that case was* IN NO SENSE *a grant of corporate franchise.*

It was simply a rule prescribed by Congress that it should be lawful for a citizen of New York to engage in intercourse in a particular way with the citizens of New Jersey.

The State law had prohibited this intercourse. The Act of Congress removed the restraint.

THE REMOVAL BY ACT OF CONGRESS OF THIS IMPEDIMENT CREATED BY STATE ACT TO LAND TRAFFIC OVER A BRIDGE, WAS EXACTLY EQUIVALENT TO THE REMOVAL BY ACT OF CONGRESS OF IMPEDIMENTS CREATED BY STATE ACT TO TRAFFIC BY WATER.

The New Jersey act prohibiting the building of a bridge was equivalent to the Virginia act so authorizing a bridge as to practically destroy navigation in *The First Wheeling Bridge Case*, 13 How., , and to the New

York act granting to Livingstone an exclusive license to navigate her waters, and hence prohibiting navigation, in *Gibbons vs. Ogden*, 9 *Wheat.*, .

The case presented was one of those so carefully prejudged by this Court in *Conway vs. Taylor's Executors*. There Justice SWAYNE, delivering the opinion of the Court, says :

"Undoubtedly the States in conferring ferry rights may pass laws so infringing the commercial power of the nation that it would be the duty of this Court to annul or control them."

And the only ground of reconciliation of the decisions of *Gibbons vs. Ogden* and *Conway vs. Taylor* is the ground of distinction now insisted upon, viz. :

In *Gibbons vs. Ogden*, the State in exercising an assumed right (which included that of ferriage) had prohibited all navigation on its waters for any and every purpose.

In *Conway vs. Taylor*, the State, in exercising its reserved powers to grant ferries, had not attempted to restrict or prohibit navigation for other purposes, hence the State was acting within its constituional powers, and had carefully not exceeded them, and the Court rests it decision upon that sole ground.

Again in the *Kill Von Kull Bridge* case the State had gone beyond its power and prohibited all bridging (including bridging under the authority of New York, which had a right to pass such an act. The ferry license in the Conway case was granted by one State alone).

It follows, therefore, that the Kill Von Kull Bridge case is clearly distinguishable, and that decision affords no warrant for the North River Bridge Act.

THE DISTINCTION CLAIMED BETWEEN THIS CASE AND THE OTHERS IS FOUNDED ON TRUE PRINCIPLES.

It may be said,

What is the difference, in fact or law, between Congress making a regulation that a New York corporation may bridge a navigable stream bounding the State of New Jersey and an act granting to a corporation created by Congress the same permission?

The answer is that *the first is within the terms of* THE EXPRESS GARNT *as a regulation of the persons and things engaged in commerce; the second is the assertion of an entirely* NEW AND DANGEROUS POWER, *viz., the right on the part of the National Government to itself engage in and carry on commerce.*

The distinction is deeply founded in fact, in law and in the history of the country.

The truth is that *the claim of Congressional power made in this case transcends all previous claims ever* made.

A decision of this case in favor of the North River Bridge Company would mean:

1ST. A COMPLETE INNOVATION UPON the practical construction of this clause as existing for a century (see PART III.).

2D. A COMPLETE ADVANCE BEYOND any of the decisions of this Court (see above argument).

3D. A REVERSAL OF THE PRINCIPLES and the limitations upon the Congressional powers enforced by several decisions of this Court directly in point, and sustained by the opinions of eminent judges of this Court, the de-

cisions of State Courts, and opinions of text writers (see PART IV.).

As is clearly shown in Part II. dealing with the definition of the term, the power "*to regulate* commerce, viz., *intercourse*, means the power to lay down rules, to which such commerce or intercourse, present or future, shall conform.

It is not a power to enter into the operations regulated, or create the things themselves that are to be regulated.

As well might it be claimed that Congress has the right to enter into the manufacture and sale of the boxes and barrels and the bales of commerce under the power "to regulate," as to enter into the building and management for profit of the bridges, the railroads, the turnpikes, the canals and the water-works.

That it is deeply founded in HISTORY is conclusively proved by the history of the clause set out in PART III.

That it isdeeply founded in law is conclusively proved by the decisions and opinions cited in PART IV.

That it is deeply founded in FACT is shown by the practical construction heretofore put upon the clause by lawyers and laymen (see below), and by the new results flowing from any overriding of this distinction (see Part I.—sub. below).

It may be frankly admitted that in a certain sense the decision of the Court against the North River Bridge charter would contravene some of the rules laid down in the cases cited. Assume that to be so—what then?

Is that any reason why the Court should hesitate to *draw the line* and establish the distinction above contended for.

We answer no.

THE COURT SHOULD DRAW THE LINE AND SHOULD ESTABLISH THE DISTINCTION.

The Court should do this for several reasons:

1st. Because of the inexpediency of reversing the practical and theoretical construction of a century.

2d. Because practical expediency requires a limitation of the power in the future, as it has been limited in the past.

3d. Because once committed to the rule in this case, there is no telling where the results will end.

4th. When all these circumstances concur, the Court should lay down the practical rule.

The first reason needs no argument to sustain it. The facts are proved in Parts II., III. and IV., *infra*.

If any further proof were needed, we might add, in addition, the practical construction placed on the Constitution these one hundred years by the lawyers and laymen—the intelligence of the bar and of business.

Before the North River Bridge act, bridge charters have always been obtained in the regular routine of first obtaining charters from the States, and then the Congressional assent as not interfering with navigation.

This was done, for example, in the cases of the Clinton Bridge (10 Wall, 454) between Illinois and Iowa, and of the New York and Brooklyn Bridge (Miller vs. Mayor of New York, 109 U. S., 385).

Numerous other precedents exist.

No harm and no inconvenience has hitherto resulted from this method.

No growing evil cries aloud for redress.

In this very instance the sovereign States have already acted.

This practice has been in accord with the precedents and decisions of a Century, and a just appreciation of the respective rights of the dual sovereignties involved in our peculiar form of government.

If this power existed—why did every one who wanted to build a railroad or a canal or a water works, go to the State Legislatures—and when bridges and railroads were to be built in more than one State—to the Legislatures of the respective States—instead of Congress?

It is useless to cite instances—their name is legion—the statute books of every State are filled with them—the Congressioual Statutes not even one.

Why did not Vanderbilt, when in 1867 he desired to amalgamate the corporations through New York into one great railroad, go to Congress, instead of the New York Legislature?

Why did not the Pennsylvania R. R., when, through long years it was building up its monopoly of the united railroads of New Jersey, go to Washington, instead of Trenton, for its enabling acts?

And, lastly, why in 1893, when McLeod and his syndicate were trying to legalize the coal combination between the Reading and the New England roads, did he go to Trenton instead of Washington for his enabling acts?

In each case a charter from Congress would have filled the bill.

The answer is: Because the mass of the people of the country—lawyers, business men and merchants—have never dreamed that such powers existed in Congress.

The practice of a century has resulted in a *practical construction* to the contrary.

It is submitted that the Court should follow the practical construction. To do otherwise will upheave long lines of decisions—long accepted truths—and lead to results beyond the present contention which no man can foresee.

The second reason is enforced as follows:

The great expediency of a Congressional power to the extent claimed is sometimes urged in support of it.

To this we answer, the expediency is more assumed than real.

The Erie Canal was built without national aid.

Have not all the great railroads and canals been built heretofore by State action, and by the action of two or more States when necessary?

Is it not a fact that under the existing construction of the Constitution these State corporations have been welded into such unity by traffic contracts and legislative action that a lady may travel from New York to New Orleans or San Francisco without ever getting out of the vestibuled limited?

Is it not a fact that this very project of bridging the Hudson River at New York City has already been authorized by the States interested (Ch. 520, Laws of New Jersey, 1868, as amended by Ch. 86, Laws of 1891, and Ch. 253, Laws of 1892; Ch. 233, Laws of New York, 1891)? And that in January of this year the consent of Congress was obtained to the bridging of said river under said State authority by an act which was vetoed by the President because of some details in the plan not meeting his approval, and an amended act drawn to meet the objections of the veto is now pending?

Where then is the proof of the evil crying for redress as alleged?

The third reason is of great weight and importance.

Let us see what would be the practical result of a ruling by this Court that Congress has the power to engage in commerce, to build railroads, canals, turnpikes, highways, bridges, water and irrigation works, pipe lines and internal improvements generally.

In the first place, the legislative and judicial departpartments of the National Government will be so flooded with acts and transactions relating to the private business affairs of business corporations as to have no time left to properly perform their ordinary constitutional functions.

Such a construction would denude the State Legislatures of one-half of their present legislative province.

The immense private corporate and syndicate interests now scattered in 43 States and taking up the time of 43 Legislatures, would move upon Congress and flood its calendars with appropriate acts to the serious impairment of its ability to perform its proper functions under the Constitution.

Under such a construction, not only will all future CANALS, RAILROADS AND TUNNELS and bridges come to Congress, instead of the respective States, for their charters; but even the enterprises now known as "INDUSTRIALS," THE SUGAR TRUST, THE WHISKY TRUST and all the large dry goods firms and wholesale grocers, all engaged in interstate commerce, will come knocking at the doors of Congress for the appropriate charters.

That the picture is not overdrawn we need only call the attention of the Court to the fact that on March 24, 1894, Representative Geissenhainer, of New Jersey,

introduced into Congress "A Bill to incorporate the American College of Musicians."

53d Congress (2d Session), H. R. 6446.

Commerce is a broad word, and the limitation of "interstate" will not bother these applicants, because they all are concerned in interstate traffic, even if their principal office is solely situated in one State.

In fact, since the 2d section of the act just above cited enacts: "SEC. 2. That the said college shall, upon request at any time of the Secretary of War or Secretary of the Navy, advise or make recommendations upon matters connected with the practice of music in the military or naval service of the United States," we will undoubtedly some day hear the argument gravely advanced that this musical college is constitutional, as coming under the implied powers "to raise armies," etc.

NOTE ALSO SOME OF THE MORE REMOTE RESULTS:

No private or county road within the limits of any State can be built or regulated without the intervention of Congress.

Grade crossings will become a province of national instead of State law.

Since Congress has the right to build railroads, it has the right to furnish them with rails, rolling stock and supplies.

Congress can, therefore, incorporate companies to manufacture locomotives, cars, rails, etc., and to mine the iron and cut the wood and condemn lands for that purpose.

And each and all of these new creations will be free from all State franchise taxes.

Gloucester Ferry Case, 114 U. S.

And from all State taxes on lands and plant.
McCullough vs. The State of Maryland.

The great mass of wealth in the country is now in corporate hands.

Many States (New York and New Jersey and others) now obtain the greater proportion of their revenue for State and other purposes from the franchise and property taxes on corporations.

Will they tamely submit to be thus shorn of the larger portion of their taxable wealth; or will an amendment to the Constitution be promptly proposed and carried to bring all this wealth back to them?

The fourth reason is enforced by the following considerations:

In construing a constitution the nearest approach to a logical and practical expediency is the aim kept constantly in view.

We have shown that logic requires that the line of implied powers should be drawn where they conflict with the independent power reserved to the State (Part II., Point I., D., p.).

We have shown that the practical construction has drawn this line (Part III. & IV.).

We have shown the expediency of drawing the line at this point *(supra)*.

Here, then, the Court should stop.

It should rest its decision wholly on this distinction.

The True Construction.

The true construction thus elaborated from the cases would be:

Under the power to regulate commerce, Congress has

the right to license or prohibit the manner of building of bridges.

But when it has gone thus far, it can go no further. There its powers and its jurisdiction cease. It can not build the bridge, or go into the business itself, or by proxy.

The sovereign power of granting bridge and ferry franchises has never been granted away—it remains in the States. They must act in the same behalf before the object can be accomplished.

This construction accords with the theory and the practice—with only one exception, and that is the North River Bridge Charter—of over a century.

PART II.

The Principles Involved.

1.

The Language of the Constitution.

SECTION VIII. PRESCRIBES:

THE CONGRESS SHALL HAVE POWER: * * *

3. "TO REGULATE COMMERCE WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES, AND WITH THE INDIAN TRIBES."

A.

DEFINITION OF THE TERMS.

Chief-Justice MARSHALL in *Gibbon vs. Ogden, 9 Wheat., 190*, had to define this clause. He did it by declaring that commerce is intercourse, and "*is regu-*

lated by prescribing rules for carrying on that intercourse."

And he further says: "WHAT IS THIS POWER? IT IS THE POWER TO REGULATE; THAT IS, TO PRESCRIBE THE RULES BY WHICH COMMERCE IS TO BE GOVERNED" (*Id.*, p. 196).

In the same case Justice JOHNSON defines the clause thus: "The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. *The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure*" (*Id.*, 227).

The lexicographers thus define the word "regulate".

The word was used 1789, and in determining what the Founders meant we must go back to the dictionaries of that date.

Diligent research has unearthed only two dictionaries of the English language as then existing, viz.:

JOHNSON'S Dictionary and SHERIDAN'S Dictionary.

JOHNSON'S Dictionary (London Ed., 1755) thus defines the word

"REGULATE:

"*1. To adjust by rule or method.*

"*2. To direct.*"

SHERIDAN'S Dictionary (Ed. 1789) thus defines the word:

"REGULATE:

"*To adjust by rule or method; to direct.*"

And JOHNSON'S Dictionary (London Ed., 1755) thus defines commerce:

"COMMERCE:

"*Intercourse, exchange of one thing for another; interchange of anything; trade; traffick.*"

SHERIDAN (ED. 1759) thus defines it:

"COMMERCE:

"*Exchange of one thing for another; trade; traffick.*"

It is evident, therefore, that the Fathers meant by this clause to vest Congress with the power "*To adjust by rule or method the intercourse between the States,*" etc., and NOT the power "*to enter into that intercourse as an active agent in it.*"

Nor has the lapse of a century produced a laxity of definition of the words which would enable this last meaning to be tortured into them.

WEBSTER'S Dictionary of 1840 thus defines "regulate":

"*Regulate*, v. t. To adjust by rule, method or established mode; as to regulate weights and measures; to regulate the assize of bread; to regulate our moral conduct by the laws of God and of society; to regulate our manners by the customary forms.

"2. To put in good order; as to regulate the disordered state of a nation or its finances.

"3. To subject to rules or restrictions; as to regulate trade; to regulate diet."

The CENTURY DICTIONARY thus defines it:

"*Regulate:*

"1. To adjust by rule, method or established mode; govern by or subject to certain rules or restrictions; direct. * * *

"2. To put or keep in good order, as to regulate the disordered state of a nation or its finances; to regulate the digestion.

"3. Specifically in musical instruments, etc.

"Syn. 1. Rule, manage, etc.; see govern."

The CENTURY DICTIONARY thus defines Commerce:

Commerce:

1. Interchange of goods, merchandise or property of any kind; trade; traffic; used more especially of trade on a large scale carried on by transportation of merchandise between different countries or between differ-

ent parts of the same country, distinguished as foreign commerce and internal commerce, as the commerce between Great Britain and United States or between New York and Boston.

As the words stand to-day, therefore, from the power *to regulate trade* cannot be inferred the power *to engage in trade.*

B.

TRUE MEANING OF THE LANGUAGE.

The true meaning of the Clause, therefore, is that CONGRESS IS THEREBY GRANTED THE POWER TO SUBJECT COMMERCE TO CERTAIN RULES OR RESTRICTIONS.

The language presupposes an existing commerce, the persons and things engaged in it, and grants to Congress the right to subject that commerce to rules and restrictions; or, in other words, to lay down rules as to how it shall be carried on by the parties and things engaged in commerce.

What powers then, are fairly implied from this express grant?

It is admitted that from this express power is fairly inferred the implied power to license or prohibit persons or things in the carrying on of commerce in particular ways or by particular agencies.

Hence Congress may enact rules in regard to navigation by one or more ships, may allow or prohibit one or more bridges to be built or one or more canals to be dug, where such action would affect interstate commerce, and may in a general way prescribe rules for the carrying on of trade.

The express grant thus construed is a grant of LEGISLATIVE NOT EXECUTIVE POWERS, is a grant of the power TO LEGISLATE; *not* a grant of the power TO ACT.

Between the powers "*to lay and collect taxes, etc.*," "*to borrow money*," "*to coin money*," "*to declare war*," "*to raise and support armies*," "*to provide and maintain a navy*," and the power "*to regulate commerce*," there is all the difference between the grant of the power *to do acts*, and the grant of the power *to lay down rules in regard to the doing of acts*. The antithesis should be given its proper weight. But now, because of this admitted power to license or prohibit the construction of one or more bridges in the exercise of the Congressional power to prescribe rules as to the manner of carrying on commerce by land or water, is asserted the right to create and to engage in commerce by building a bridge or bridges, and carrying on the bridge business for profit, and, incidentally, to incorporate a company with full powers for that purpose.

In 1862, Mr. Justice SWAYNE, delivering the opinion of this Court in the important constitutional case of *Conway vs. Taylor*, 1 Black, 603, said:

> "There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for an Act of Congress which involves the exercise of this power."

THE THREE-QUARTERS HAD ROLLED INTO A FULL CENTURY BEFORE THIS UNBROKEN LINE OF PRECEDENTS WAS VIOLATED BY THE NORTH RIVER BRIDGE ACT.

The practical construction of a century should have some weight.

The framers of the Constitution used words with care. They did not use many words, but those they used were carefully discussed, defined and dissected in the course of their debates.

Wherever, then, the words do not lend themselves without a wrenching and straining out of their meaning to any alleged construction, it is well to consider whether in case the alleged construction was really intended there were, in the whole vocabulary of the English language, other common words that would have presented themselves as better conveying the alleged meaning. If there were, and these words were passed over, the omission is significant as indicating a clear intention not to grant the power alleged.

Had the framers of the Constitution intended to grant the powers alleged, the natural, ordinary and clear medium of expressing such intent would have been, to use the words "to engage in." The clause would then have read:

"*To regulate* (AND ENGAGE IN) *commerce with foreign nations*," etc.

They did not use those words, hence they had no intention to make such a grant.

Again, the complete addition of a new meaning to the grant of powers made by the words "TO REGULATE," by this contention that they imply the meaning "TO ENGAGE IN," becomes doubly apparent, when, by inserting the alleged implied meaning with the express words used, we see at once the immense extension of powers as denoted.

Note, also, that the addition of the words "AND ENGAGE IN" does not produce the slightest tautology in the sentence. On the contrary, the addition of those words naturally and appropriately expresses the fresh and independent power claimed.

This circumstance is, in itself, the clearest proof that the words "*to regulate commerce*" do not cover, and

were never intended to cover, the alleged meaning "*to engage in* commerce."

C.

THE IMMENSE EXTENSION OF MEANING OF THE WORDS INVOLVED IN THE CLAIM THAT CONGRESS CAN ENGAGE IN COMMERCE.

And right here the extent of this unwarranted stride in the assertion of Congressional power is apparent.

a.

The alleged IMPLIED RIGHT *has resulted in a grant broader and more extensive than can be found in the four corners of the* EXPRESS WORDS *used.*

It is admitted that Congress has no general power to create a corporation.

Congress can only create a corporation to do something that Congress itself has full power to do.

The power of Congress to create a corporation to carry on the business of a bridge company, is, therefore, dependent upon whether Congress itself can carry on the business of a bridge company.

But the bridge company is only one form of the enterprises of commerce, and, if Congress has the right to engage in that kind of an enterprise, it may carry on any other.

In other words, *the assertion that Congress has full power to incorporate a bridge company is an assertion that Congress has the power to carry on the bridge business*, AND ENDS IN THE ASSERTION THAT CONGRESS HAS POWER TO ENGAGE IN ANY KIND OF INTERSTATE COMMERCE.

Thus, from the carefully expressed and limited grant of the express power "*to regulate commerce*," viz., to lay down laws or rules for its transactions, is finally deduced *the right to enter into all kinds of commerce, and to engage in the various enterprises appropriate thereto*, provided it is interstate.

As will be shown hereafter, the framers of the Constitution never deamed that the wildest scope of imagination could produce this result from the language they used.

b.

AGAIN TO PUT THE ARGUMENT FROM A DIFFERENT POINT OF VIEW.

When the people of the United States created the Federal Government by the Constitution they had the whole field of the sovereign power to choose from for the purpose of vesting powers in the new government.

This field consisted of several independent powers or branches of the power—as to levy certain taxes, to coin money, to create courts, to raise and support armies, to declare war, to regulate commerce, to license ferries and bridges.

Out of the immense mass of independent sovereign powers possessed by the States, they selected certain particular ones and invested Congress by express words with such powers—to declare war, to regulate commerce, etc.; and, to prevent all ambiguity, they distinctly prescribed that all powers not granted were "RESERVED TO THE STATES RESPECTIVELY OR TO THE PEOPLE."

It admits of no denial that the powers "to raise armies, to declare war, to regulate commerce," etc., are independent substantive powers of a sovereign State.

The same is true of the power to license ferries and bridges. (The proof, if needed, is contained in 1, Wait's Actions and Defences, 729. 3 *Id.*, 345).

The distinct power to create grants of bridge and ferry franchises (a power which implies the exclusive right of the sovereignty itself to engage in such business), is not among the enumerated powers expressly vested in the United States by the Constitution.

Yet now it is gravely argued that this power is implied in the grant of the power "to regulate commerce," because bridges and ferries improve and facilitate commerce; hence, are connected with commerce as aiding or hindering it; hence, the bridging of streams is a regulation of commerce.

The *non-sequitur* is apparent in the mere statement of the steps of the inference. But another point of view shows up the absurdity of the contention.

Suppose, for the sake of argument, that the Constitution omitted the grants to Congress of the powers "to raise armies, to declare war," yet granted it the right "to regulate commerce."

At first blush nothing would appear plainer than that, under such circumstances, the right to declare war was reserved to the States.

But now observe the effect of applying to these circumstances the logic of the latitudinarian constructionist—the logic of implied powers.

Here is his argument :

The power "to regulate commerce" is expressly granted—this implies complete control over the regulation of commerce—hence, if any foreign nation should interfere with commerce, it implies a power to stop such interference ; hence, a power to declare war, if necessary to prevent such interference ; hence, a power to raise

armies to put down such interference ; hence, a power to levy taxes to support the armies.

To complete the result of this line of argument we must add the principle that Congress is the sole judge of the expediency of employing, under any circumstances, any of the implied powers (McCullough vs. The State of Maryland, 4 Wheat.).

Thus, out of an innocent-looking grant by the States of the right to lay down rules as to the transaction of commerce, would be derived a complete surrender of the immense powers of war and peace and levying taxes.

And thus is the argument for the power of Congress to grant this bridge charter reduced to its fitting *reducto ad absurdum*.

D.

The true limits of the implication doctrine.

What, then, is the true limit of the implication of implied powers from express—it is this :

In construing a document of limited grants—such as the Constitution—in view of the circumstances surrounding its adoption and the manner of its expression, these fundamental rules of logic and common sense should be applied :

1st. *Each independent branch of the sovereign power intended to be granted is naturally included in an independent express grant.*

2d. *Each independent express grant implies the powers incidental and necessary to its fulfillment.*

When, however, the operation of the second princi-

ple results in the implication from one express grant of powers, separate, independent and of equal or immensely greater magnitude and importance than the power granted by the terms of the express grant itself, the two principles come into violent and irreconcilable conflict. For the grant of one independent power is not to be construed by implication as conveying another independent power of equal or immensely greater importance; when, had the alleged implied grant been intended, the natural mode of conveying such meaning would have been to employ the appropriate, express words.

THE RESULTING CONFLICT, THEN, SHOULD BE RECONCILED BY CUTTING OFF THE ALLEGED IMPLIED POWER AT THE POINT WHERE IT MERGES INTO THE GRANT OF A NEW SUBSTANTIVE POWER.

(As affording moral evidence of the soundness of the results reached by this argument from general principles, see the history of the struggle in the Constitutional Convention over this clause in APPENDIX B.)

E.

THE CONCLUSION REACHED ESTABLISHES A VALID DISTINCTION BETWEEN THIS CASE AND THE RULINGS OF THIS COURT IN THE PENSACOLA TELEGRAPH CASE AND OF MR. JUSTICE BRADLEY IN THE KILL VON KULL BRIDGE CASE.

The distinction established is the same as that pointed out under Point I.—viz.:

In those cases Congress, by the acts then in question, regulated commerce.

In this case Congress, by the act in question, engages in commerce.

PART III.

History of the Clause Regulating Commerce.

The history of the struggle over this clause in the Constitutional Convention is given in the APPENDIX A. It affords convincing moral evidence that no one at that time dreamed that the right "*to engage in*" commerce was conferred by the right "*to regulate it.*"

After the passage of the Constitution, questions arose between the two parties as to the meaning and extent of the powers granted, and one of these questions was the power of Congress over internal improvements.

First came the long struggle over the United States Bank.

And bear in mind, that when the constitutionality of that act was finally established by Chief-Justice MARSHALL, that learned jurist did not seriously attempt to base the power of Congress to incorporate the bank upon the clause granting power to regulate commerce, but derived that implied power from other independent clauses, namely, on the grounds that a sovereign power was created having the powers of "*the sword and the purse,*" and that a bank was required for the fiscal operations of the Government, and the right to incorporate one therefore implied (*McCullough vs. The State of Maryland*, 4 Wheat., 422).

If the principle of the present contention of the North River Bridge Company had then received any favor from any one it would have then been decisive of the whole question, and there would have been no necessity for any further argument.

If the power to regulate commerce is a power to engage in it, then the business of banking is as much within the purview of the power as the business of transporting passengers across a bridge.

The "Great Expounder" of the Constitution, in laboring through many pages of argument to derive the power to incorporate a bank from the other express powers, was, therefore, guilty of an oversight for which no mere law student would have had any excuse—that is, if the confident contention of the counsel for the North River Bridge Company is as patent as they claim.

THE FIRST ATTEMPT *to have the Federal Government interfere in internal improvements was in the case of the* CUMBERLAND ROAD. This was begun in 1806 (Landon's U. S. Const. Hist., p. 142).

But here was put forward no claim that Congress had the constitutional right to build this road without the consent of the States.

On the contrary, the act was conditioned upon the consent of the States through which the road should pass, and all that was claimed was that the Federal Government had the right to expend moneys in public improvements *by and with the consent of the States* in which they were situated.

Later, Congress passed an act to set apart and pledge "certain funds for internal improvements," and directed that the moneys constituting said funds "be applied in constructing such roads or canals, or in improving the navigation of such watercourses, or both, in each State, *as Congress, with the assent of such State, shall by law direct.*"

4 Elliott's Debates, 468.

How modest the assertion of power in this instance!

There is no claim of power to build the road. There is no claim of power to donate moneys for the purpose, except subject to the express assent of the States; yet, PRESIDENT MADISON vetoed this bill as unconstitutional, saying:

"The power to regulate commerce among the several States cannot include a power to construct roads and canals, and to improve the navigation of water-courses, in order to facilitate, promote and secure such a commerce without a latitude of construction departing from the ordinary import of the terms;" and he adds

"I am not unaware of the great importance of roads and canals, and the improved navigation of water courses, and that a power in the national legislature to provide for them might be exercised with signal advantage to the general prosperity; but, seeing that such a power is not expressly given to the Constitution, and believing that it cannot be deduced from any part of it without an inadmissible latitude of construction and a reliance on insufficient precedents; believing, also, that the permanent success of the Constitution depends on a definite partition of powers between the General and State Governments, and that no adequate landmarks would be left by the constructive extension of the powers of Congress, as proposed in the bill—I have no option but to withhold my signature from it." * * *

4 Elliot's Debates, pp. 468, 9.

In 1822, Congress, still desiring to carry out the Cumberland Road improvement, passed an act which, instead of merely pledging the public moneys to the improvement, asserted a right to levy and collect tolls, etc.

PRESIDENT MONROE, in vetoing this "Act for the Preservation and Repair of the Cumberland Road," wrote:

"A power to establish turnpikes with gates and tolls, and to enforce the collection of tolls by penalties, implies a power to adopt and execute a system of internal improvement. A right to impose duties to be paid by

all persons passing a certain road, and on horses and carriages, as is done by this bill, involves the right to take land from the proprietor, on a valuation, and to pass laws for the protection of the road from injuries; and, if it exists as to one road, it exists as to any other, and to as many roads as Congress may think proper to establish. A right to legislate for one of these purposes is a right to legislate for the others. *It is a complete right of jurisdiction and sovereignty, for all the purposes of internal improvement and not merely the right of appropriating money under the power vested in Congress to make appropriations*—UNDER WHICH POWER, WITH THE CONSENT OF THE STATES THROUGH WHICH THE ROAD PASSES, THE WORK WAS ORIGINALLY COMMENCED, AND HAS BEEN SO FAR EXECUTED. *I am of the opinion that Congress do not possess this power*, that the States, individually, cannot grant it; for, although they may assent to the appropriation of money within their limits for such purposes, they can grant no power of jurisdiction or sovereignty by special compacts with the United States. This power can be granted only by an amendment to the Constitution and in the mode prescribed by it.

"If the power exist, it must, either because it has been specifically granted to the United States or that it is incidental to some power which has been specifically granted. *If we examine the specific grants of power we do not find it among them; nor is it incidental to any power which has been specifically granted.*

It never has been contended that the power was specifically granted. It is claimed only as being incidental to one or more of the powers which are specifically granted.

"The following are the powers from which it is said to be derived:

"1st, from the right to establish post-offices and post roads; 2d, from the right to declare war; 3d, to regulate commerce; 4th, to pay the debts and provide for the common defense and general welfare; 5th, from the powers to make all laws necessary and proper for carrying into execution all the powers vested by the Constitution in the Government of the United States, or in any department or offices thereof; 6th and lastly, from the powers to dipose of and make all needful rules and regulations respecting the territory and other property of the United States.

"*According to my judgment, it cannot be derived from either of those powers nor from all of them united, and, in consequence, does not exist.*"

4 Elliott Debates, 525.

And, finally, in view of the great opposition to the Cumberland road as a usurpation of power by Congress never granted by the Constitution, Congress ceded back to the respective States in which it was situated all rights over the road.

In all this discussion over the Cumberland road, as in the case of the bank, its active promoters never laid any particular stress upon the claim that the power could be derived from the grant of the right to regulate commerce.

Perhaps this neglect was due to a wholesome respect for the argument of THOS. JEFFERSON in construing this clause with reference to the then alleged right of Congress to charter a bank.

THOMAS JEFFERSON wrote, in 1791, two years after the adoption of the Constitution, as follows:

"3. To regulate commerce with foreign nations and among the States and with the Indian tribes.

"To erect a bank and to regulate commerce are very different acts. He who erects a bank creates a subject of commerce in its bills; so does he who makes a bushel of wheat, or digs a dollar out of the mines; yet neither of these persons regulate commerce thereby. TO MAKE A THING WHICH MAY BE BOUGHT AND SOLD, IS NOT TO PRESCRIBE REGULATIONS FOR BUYING AND SELLING."

4 Elliot's Debates, p. 610.

Paraphrasing this, we may say—*To make a bridge which may be used for the intercourse of commerce, is not to prescribe regulations for that intercourse.*

In 1830 PRESIDENT JACKSON, in vetoing the Maysville Road bill, called attention to the two views of Congressional power over internal improvements.

1st. As bearing on the question of the sovereignty of the States within whose limits their execution is contemplated, if jurisdiction of the territory which they may occupy be claimed as necessary to their preservation and use.

2d. As asserting the simple right to appropriate money from the National Treasury in aid of such works when undertaken by State authority.

Referring to the first view, he says:

"Although frequently and strenuously attempted, the power to this extent has never been exercised by the Government in a single instance. It does not, in my opinion, possess it, and no bill, therefore, which admits it can receive my official sanction."

4 Elliot's Debates, 526.

It is probably by reason of these vetoes that the question involved in this case has never been squarely presented in this Court.

Had it been presented up to and including the time of the decision in Conway against Taylor's Exrs., 1 Black, it would certainly have been decided against The North River Bridge Company.

Even the "Great Expounder" of the Constitution CONCEDED, in 1824, that the right to license turnpikes, roads, ferries, and, hence, bridges, was in the States, and not in Congress.

He says: "Inspection laws, quarantine laws and laws of every description, as well as laws for regulating the internal commerce of a State, *and those which respect turnpike roads, ferries, etc.*, are component parts of this mass"—namely, "*of that immense mass of legislation which embraces everything within the territory of the State not surrendered to the General Government*" (Gibbons vs. Ogden, 9 Wheat., 1, 203).

No further attempt was made by Congress to incor-

porate a company for internal improvements until July 1, 1862, when *The Union Pacific Railway* was chartered.

This charter is not a precedent for the *North River Bridge charter*, because it was a mere exercise of the sovereign powers of Congress over the territories and the public lands.

Thus the power granted is to construct a railroad from a point "*in the Territory of Nebraska, thence through the Territories of the United States to the western boundary of the Territory of Nevada.*"

See Act July 1, 1862.

And although by a subsequent act in 1866 the corporation was allowed to extend into California, concurrent State action was had (see Act of California incorporating the Central Pacific referred to in 127 U. S., p. 35).

It is worthy of note also that the constitutionality of the Union Pacific act was not defended on the ground that it was included in the power "to regulate commerce," but on the ground of the powers "to declare war and repel invasion."

See BUCHANAN'S MESSAGE quoted in The Union Pacific Railway (Davis).

In this message PRESIDENT BUCHANAN went on to argue the necessity of the road to defend California from foreign attack; and claimed that, at any rate, *the precedent was not dangerous, because it was impossible to conceive such a combination of extraordinary and unprecedented circumstances supporting the expediency of the proposed action as then existed.*

And the Court, in a case not involving the constitutionality of that act, referred to the exceptional circumstances under which it was passed—the civil war

then existing—the threatened war with England—and the necessity of opening communication for the defense of California; and say:

"But the primary object of the Government was to advance its own interests, and it endeavored to engage individual co-operation to that end—the securing of a road which could be used for its own purposes."

The U. S. vs. Union Pacific R. R. Co., 91 U. S., 72, 81.

The National Bank Acts of 1866 are, of course, not in point as precedents. The authority for them is found elsewhere in the constitution. The *Cumberland Road* and the *Union Pacific Act*, not being precedents in that behalf, *The North River Bridge* act passed in 1890—one hundred years after the adoption of the constitution—*stands solitary—unique—and alone as an unwarranted usurpation of Congressional power.*

And promptly thereafter, and in the same line, was passed the act incorporating the Nicaragua Canal Company. And promptly thereafter, and in the same line, was proposed March 24th, 1894: "*A bill to incorporate the American College of Musicians*" (H. R. 64,446.)

Thus we may trace the gradual development of this alleged implied power of Congress from its cradle.

At its birth, its sponsors merely asserted its right to exist in connection with the assent of the States, and as a means of promoting the general welfare.

Then came the time when it was claimed that Congress had the right to donate public money to the public good without the express concurring assent of the States.

Then, growing stronger by the meat it fed upon, this implication claims the right to act independently, without the States, and in defiance of them.

In spite, however, of all the claims put forward for this Congressional power, *the unbroken precedents of a century have been opposed to the existence in Congress of the right to build bridges, railroads or highways.*

SHALL THIS PRACTICAL CONSTRUCTION OF THIS DOCUMENT BE NOW OVERRULED?

PART IV.

The Decisions.

I.

The power to authorize the building of bridges is not to be found in the Federal Constitution. It has not been taken from the States.

The rule that the power to establish ferries and bridges is vested exclusively in the States and is not included in any of the powers granted to the Federal Government is sustained by the following decisions of this Court:

Conway vs. Taylor's Executors, 1 Black., 603, cited and approved in Wiggins Ferry Co. vs. East St. Louis, 107 U. S., 365.

Milnor vs. New Jersey R. R. & Tramp. Co., 16 U. S., Sup. Ct. (Lawy. Co. Pub. Co.), 999, etc.

Gilman vs. Philadelphia, 70 U. S. (3 Wall.), 713, cited and approved in Williamette Iron Bridge Co. vs. Hatch, 125, U. S., 1.

THIS RULE IS CONCEDED in *Gibbons vs. Ogden*, 9 Wheat., 203, by the "great expounder" himself, who found more powers in the Constitution than any man before or since.

THE RULE IS SUSTAINED by the opinions of the following Judges of this Court: Justice McLEAN in the Wheeling Bridge Case; Justice WAYNE in the Wheeling Bridge Case; Justice FIELD in the Newport and Cincinnati Bridge Case.

In *Wright vs. Nagle*, 101 U. S., page 791, Chief-Justice WAITE SAID:

"*The Legislature of a State alone has authority to make such grants.*"

And Chancellor KENT, in his commentaries, referring to the proper construction of the power to regulate commerce, says:

"IT IS ADMITTED THAT THE GRANT TO CONGRESS TO REGULATE COMMERCE ON THE NAVIGABLE WATERS OF THE SEVERAL STATES CONTAINS NO SESSION OF TERRITORY OR OF PUBLIC OR PRIVATE PROPERTY."

1 Kent Comm., 439.
Caulfield vs. Corgell, Wash. C. C. Rep., 371.

"THE NATIONAL GOVERNMENT POSSESSES NO POWERS BUT SUCH AS HAVE BEEN DELEGATED TO IT. THE STATES HAVE ALL BUT SUCH AS THEY HAVE SURRENDERED.

"THE POWER TO AUTHORIZE THE BUILDING OF BRIDGES IS NOT TO BE FOUND IN THE FEDERAL CONSTITUTION.

"IT HAS NOT BEEN TAKEN FROM THE STATES.

"IT MUST RESIDE SOMEWHERE. THEY HAD IT BEFORE THE CONSTITUTION WAS ADOPTED, AND THEY HAVE IT STILL."

Gilman vs. Philadelphia, 3 Wal., 713.

In *The People vs. Renssaeler & Saratoga R. R. Co.*, 15 Wend., 114, 132, Chief-Justice SAVAGE says:

"I think I may safely say that a power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters which they cross. Such power certainly did exist in the State Legislature before the delegation of power to the Federal Government by the Federal Constitution. It is not pretended that such a power has been delegated to the general Government, or is conveyed under the power to regulate commerce and navigation; it remains then, in the State Legislatures, or it exists nowhere. *It does exist, because it has not been surrendered any further than such surrender may be qualifiedly implied; that is,* THE POWER TO ERECT BRIDGES OVER NAVIGABLE STREAMS MUST BE CONSIDERED SO FAR SURRENDERED AS MAY BE NECESSARY FOR A FREE NAVIGATION UPON THOSE STREAMS. By a free navigation must not be understood a navigation free from such partial obstacles and impediments as the best interests of society may render necessary."

* * * * * *

"There is in our State Constitution no limitation of the power to build bridges, and there is in the Federal Constitution no grant of such a power. There can be no question, therefore, that the State Legislature has the power to build bridges where they shall be necessary for the convenience of its citizens. * * *

"It is not, I apprehend, for the State authorities to go in advance of the Federal Government in making a surrender of powers *not claimed by the Federal Government*, and which if surrendered cannot be exercised at all." * * *

Mr. Justice SWAYNE, in delivering the opinion of this Court in Gilman vs. Philadelphia, 3 Wall., 713, says:

"The National Government possesses no powers but such as have been delegated to it. The States have all but such as they have surrendered. THE POWER TO AUTHORIZE THE BUILDING OF BRIDGES IS NOT TO BE FOUND IN THE FEDERAL CONSTITUTION. It has not been taken from the States. It must reside somewhere. They had it before the Constitution was adopted, and they have it still. * * *

"In Gibbons vs. Ogden, 9 Wheat., 203 it is said:

"'Inspection laws form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government, or which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description as well as laws for regulating the internal commerce of a State, *and those which respect turnpike roads, ferries, &c., are component parts of this mass.*' BRIDGES ARE OF THE SAME NATURE WITH FERRIES AND ARE UNDOUBTEDLY WITHIN THE CATEGORY THUS LAID DOWN" (People vs. Rens. & R. R. Co., 15 Wend., 113)."

The same question was involved in the prior case of Milnor vs. New Jersey R. R. and Transportation Co., 16 U. S. Sup. Ct. Repts. (Lawyers' Co-operative Ed.), page 799.

In that case the complainants, owners of enrolled vessels, sought to enjoin the erection of a bridge across the Passaic River, erected under State authority. The Passaic River was a navigable stream, and Congress had created a port of entry above the bridge.

GRIER, Judge, dismissed the bill. An appeal was taken, and the decree was affirmed in this Court by a divided Court, no opinion being written.

GRIER, Judge, says:

"The police power to make bridges over its public rivers is as absolutely vested in a State, as the commercial power is in Congress, and no question can arise as to which is bound to give way, when exercised over the same subject matter till a case of actual collision occurs."

He further says (*Idem*, p. 806):

"I see no reason why the State of New Jersey, in the exercise of its absolute sovereignty over the river, may not stop it up altogether, and establish the harbor and wharves at Newark, at the mouth of the river. It would affect the rights of no other States. It would still be a port of entry if

Congress chose to continue it so. Such action would not be in conflict with any power vested in Congress. A State may, in the exercise of its reserved powers, incidentally affect subjects intrusted to Congress without any necessary collision. All railroads, canals, harbors or bridges necessarily affect, not only the commerce within a State, but between the States. Congress, by conferring the privilege of a port of entry upon a town or city, does not come in contact with the police power of a State, exercised in bridging its own rivers below such port. If the power to make a town a port of entry includes the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads and canals, to land as well as water? Assuming the right (which I neither deny nor affirm) of Congress to regulate bridges over navigable rivers below ports of entry, yet, not having done so, the Courts cannot assume to themselves such a power."

The case of *Gilman vs. Philadelphia (Idem*, p. 506), has lately been reaffirmed in *Willamette Iron Bridge Company vs. Hatch* (125 U. S., 1).

In *Pensacola Telegraph Co. vs. Western Union Telegraph Co.*, 96 U. S., 1, Mr. Justice FIELD says:

"It has been decided only within the past two years that the Government, if such property cannot be obtained by purchase, may appropriate it upon making just compensation to the owner (Kohl vs. U. S., 91 U. S., 367, XXIII., 449); but never has it been suggested that the United States could enable a corporation of one State to condemn property in another State, in order that it might transact its private business there.

* * * * * *

"If, therefore, foreign corporations can exist in the State of Florida, and do business there by the authority of Congress, IT MUST BE BECAUSE CONGRESS CAN CREATE SUCH CORPORATIONS FOR LOCAL BUSINESS—A DOCTRINE TO WHICH I CANNOT ASSENT, AND WHICH TO MY MIND IS PREGNANT WITH EVIL CONSEQUENCES."

And, as proving that although this is a dissenting opinion, every word of it is entitled to its full weight by all the stronger reason when applied to the different

facts of this case, we quote that portion of the opinion of the majority which expressly limits the scope of their decision, clearly excepting from its operation the facts of this case.

CHIEF-JUSTICE WAITE, in this case, speaking for the majority, says:

"It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service and exclude all others from its use. The present case is satisfied if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness."

* * * * * *

The legislation of Florida, if maintained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph, except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States."

* * * * * *

No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made."

Pensacola Tel. Co. vs. Western Union Tel. Co., 96 U. S., 1.

In *Newport and Cincinnati Bridge Co. vs. U. S.*, 105 U. S., 470, a bridge over the Ohio, authorized by the laws of Kentucky and Ohio, was declared an obstruction to navigation, and a nuisance, by Act of Congress, and this Court held that the power of Congress to so declare was paramount.

Mr. Justice FIELD, in delivering a dissenting opinion, says: "The conclusion I draw is, that a bridge constructed by the authority of a State, if it does not

interfere with the free navigation of the stream is a lawful structure, and can neither be taken nor destroyed by Congress or by the State, except as other private property may be thus taken—that is, for public purposes, upon making just compensations." * * *

If bridges crossing natural highways cannot be constructed without the consent of congress, because it is vested with the power to regulate commerce with foreign nations and among the States for like reason bridges cannot be constructed without such consent over artificial highways on land. The argument for the necessity of the consent in the one case is equally good in the other, and is equally unsound in both. In nearly every county of every State, bridges have been constructed under the State authority over railways, the great highways of commerce in modern times, and it has never been suggested that the consent of Congress to their construction was at all necessary.

"*Nor do I find in the previous decisions of this Court any recognition of a power in Congress to authorize the construction of bridges over navigable streams within or bordering on the States, in the sense that its permission will justify their construction, and that without it such construction would be unlawful, except, of course, bridges which are parts of works undertaken for national purposes, nor of a power to regulate them; that is, to control them after they are constructed.*"

And referring to the Wheeling Bridge case as merely deciding that a bridge which had been declared to be an unlawful structure, as obstructing the navigation of the river, could afterwards be legalized by Congress,

Justice FIELD says:

"This is a very different thing from asserting a power to declare that a structure, lawful when erected and in no way interfering with the navigation of the river, is an unlawful structure, removable without compensation to the owner. I cannot admit that there is any such arbitrary power under our Government. I find no warrant for it in the Constitution; on the contrary, all the guarantees which that instrument contains for the security of property negative its existence. *Yet out of this assertion of a power to legalize a structure, which without such sanction would be deemed*

an obstruction to navigation, HAS GROWN UP THE DOCTRINE OF AN INDEPENDENT POWER IN CONGRESS TO AUTHORIZE THE CONSTRUCTION OF BRIDGES OVER NAVIGABLE STREAMS WITHOUT THE PERMISSION OF THE STATES, AND TO CONTROL THEM WHEN CONSTRUCTED. In this we are furnished with striking illustration of the facility with which power is assumed from expression, loosely or inadvertently used, apparently recognizing its existence. From the use of the word "assent" to the erection of a bridge over a navigable river, or the declaring of one already erected a lawful structure, the transition has been easy and natural to the assumption of an affirmative power in Congress to authorize independently of the action of the States, the construction of such bridges and to control them.

"From the authorities cited and the reasons assigned, it is evident that Congress possesses no such power. In the *Wheeling bridge* case in the 18th of Howard, *Mr. Justice* NELSON, who delivered the prevailing opinion, said:

"'The bridge had been constructed under an Act of the Legislature of the State of Virginia, and it was admitted that act conferred full authority upon the defendants for the erection, subject only to the power of Congress in the regulation of commerce' (59 U. S., XV., 436). *Mr. Justice McLean*, while dissenting from the asserted power of Congress to declare a bridge to be a lawful structure, which had been adjudged by the Court to be a public nuisance as an obstruction to navigation, spoke with emphasis against the existence of any authority in Congress to construct bridges, and, of course, to authorize their construction, and his views do not appear to have met with any dissent from the other Judges. 'If,' said he, 'under the commercial power, Congress may make bridges over navigable waters, it would be difficult to find any limitation to such a power. Turnpike roads, railroads and canals might, on the same principle, be built by Congress. And if this be a constitutional power it cannot be restricted or interfered with by any State regulation. *So extravagant and absorbing a Federal power as this has rarely, if ever, been claimed by any one. It would, in a great degree, supersede the State government by the tremendous authority and patronage it would exercise. But, if the power be found in the Constitution, no principle is perceived by which it can be*

practically restricted. This dilemma leads us to the conclusion that it is not a constitutional power.'

"Such, also, has been the uniform doctrine of the Supreme Courts of several States declared by Judges, some of whom were justly distinguished for their learning and ability. Thus, in People vs. R. R. Co., in the Supreme Court of New York, Ch.-J. SAVAGE, in delivering its opinion, said: "I think I may safely say" (quoting the clause quoted above).

Although this, too, was a dissenting opinion, it is submitted that the question decided in that case in no way prejudged the question now before the Court, and that a decision against the claims of the North River Bridge Company in this suit would not conflict with any of the majority decisions cited.

Under such circumstances the arguments and illustrations of the dissenting opinion have all the greater force as applied to the facts now in judgment.

II.

Results of the decisions down to Mr. Justice Bradley's decision in the Kill von Kull Bridge Case.

FIRST. *The power to bridge navigable streams is in the States, subject to the express control of Congress, in case such bridge is an obstruction to navigation.*

A distinction is sometimes attempted to be drawn between the *Gilman Bridge* case and the *Wheeling Bridge* case on the ground that the latter applied to a bridge between two States over a river not wholly in the State giving the authority; and, hence, involved interstate commerce.

The distinction is, however, more fanciful than real.

1st. In the Wheeling Bridge case, navigation was only possible in the eastern channel, which was wholly

within the State of Virginia, which had granted the authority (the Court held this to be of no importance, p. 565).

2d. In both cases the commerce of other States was involved. For in the Schuylkill case the right of the commerce of the States of Delaware and Maryland from below the bridge to reach points in Pennsylvania above, was a right equal in legal importance to the right of the commerce of the State of Pennsylvania, from above the Wheeling Bridge, to reach points in the United States below the same.

3d. In both cases the only way in which Congress had acted so as to interfere with the State rights was to create a port of entry above the bridge.

The *Gilman* case is, therefore, a practical overruling of the *Wheeling* Bridge case; and practically holds that if adjacent States have authorized a bridge to be built, and Congress has not by any act beyond the creation of ports of entry and licensing of vessels for the coasting trade forbidden it as a nuisance to navigation, such authority would be ample, and would legalize any structure erected under such authorization.

SECOND. *The power of the States in this respect is subject to the power of Congress under the power "to regulate commerce," to declare what bridges are, and what bridges are not, nuisances to navigation.*

Penn. vs. The Wheeling Bridge Co., 13 How., 518.

Power of Congress to legalize the structure.

Penn. vs. The Wheeling Bridge, 18 How., 421.

Power of Congress to abate the structure.

Newport & Cincinnati Bridge Co. vs. U. S., 105 U. S., 470.

And no case has gone so far as to hold that the power "to regulate commerce," was a grant to Congress of the right and authority "to build bridges."

In this respect, as repeatedly shown above, there is practically no distinction between the reserved power of the State over *Bridges* and the reserved power over *Ferries*.

Yet this is what the Supreme Court held in 1861, as to the authority having under the Constitution the right to license ferries.

> Conway vs. Taylor's Executors, 1 Black., 603.

In that case it was claimed that an exclusive ferry license to ferry passengers and freight across the Ohio, at Newport, granted by only one of the States, *i. e.*, Kentucky, with no corresponding license from Ohio, as to the other shore, was unconstitutional and void, as against a vessel enrolled under the United States laws, and carrying on the coasting trade under those laws. The contention was unsuccessful in the State Court, and an appeal was brought.

SWAYNE, J., in giving the opinion of the Court, says:

> "Undoubtedly, the States, in conferring ferry rights, may pass laws so infringing the commercial power of the nation, that it would be the duty of this Court to annul or control them."
>
> Pa. vs. Wheeling Bridge Co., 15 How., 519.

(Note how aptly this cautious prejudgment coincides with the true grounds upon which the decisions in the *Pensacola Telegraph Co.* case and the *Kill von Kull Bridge* case can be sustained; and with the distinction pointed out in PART I., to exist between those cases and the case in hand.)

"The function is one of the extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in question in this case are not of that character. We find nothing in them transcending the legitimate exercise of the legislative power of the State.

* * * * * *

"There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all of that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any Act of Congress which involves the exercise of this power.

"*That the authority lies within the scope of 'that immense mass' of undelegated powers which 'are reserved to the States respectively,' we think too clear to admit of doubt.*

"*We place our judgment wholly upon that ground.*"

The doctrine of the case of Conway vs. Taylor was affirmed with approval in *Wiggins Ferry Co. vs. East St. Louis*, 107 U. S., 365.

There Justice Woods, delivering the opinion of the Court, said:

"And in the case of Conway vs. Taylor's Exrs., 1 Black, 603, Mr. Justice Swayne speaking for the Court, in reference to a ferry established across the Ohio River, between the States of Ohio * * * and Kentucky, *declared that the power to establish and regulate ferries did not belong to Congress* under the power to regulate commerce, but belonged to the States, and lay within the scope of that immense mass of undelegated powers reserved by the Constitution to the States."

And the authority of the States to grant authority for ferries over navigable waters has been sustained in

Fanning vs. Gregoire, 16 How., 524.
People vs. Babcock, 11 Wend., 590.
Bowman vs. Warton, 2 McLean, 377.
Memphis vs. Overton, 3 Yerg., 390.
Phillips vs. Blommington, 1 Green, Ia., 498.

Freeholders vs. The State, 4 Zab., 723.
Wills vs. County of St. Clair, 16 How., 524.

FOR OTHER CASES RECOGNIZING THE POWER OF THE STATES TO AUTHORIZE BRIDGES AND DAMS, SUBJECT TO THE RIGHT OF CONGRESS TO INTERFERE IN THE INTERESTS OF FREE NAVIGATION, SEE

Pound vs. Turck, 95 U. S., 459 (dam aeross river).
Escanaba Co. vs. Chicago, 107 U. S., 678 (bridge).
Hamilton vs. Vicksburgh, Shreveport, etc., R. R. Co., 119 U. S., 280.
Cardwell vs. American River Bridge Co., 113 U. S., 205 (bridge).
Mobile Co. vs. Kimball, 102 U. S., 691 (State right to improve harbors and bays, etc.).
Veazie vs. Moor, 14 How., 568 (State right to grant exclusive right of navigation in Penobscot River).

FOR OTHER CASES PROVING THAT THE RIGHT TO LICENSE FERRIES AND BRIDGES WAS AN INDEPENDENT PORTION OF THE POWERS OF A SOVERIGNTY,

1 Wait's Actions and Defenses, 730.
3 *Id.*, 346.

LASTLY.

For the reasons stated, the North River Bridge Act should be declared to be unconstitutional.

JOSIAH M. VALE,
Counsel for John C. Crevier.

APPENDIX A.

The Contemporaneous Construction of the Fathers.

The history of the insertion of this particular clause in the grant of powers to Congress is instructive.

The evils that had existed under the weaker form of government constituted by the articles of confederation are fully set out in the Madison resolutions for empowering Congress to regulate trade.

> 1 Elliott's Debates, 114, and the reports of committees on the expediency of granting Congress the power to regulate commerce, 1 Elliott's Debates, p. 108.

They consisted chiefly of the inconvenience arising from duties and restrictions levied by each State upon the commerce of the other, and the practical impossibility of arranging any sort of a system of reciprocity of trade with foreign nations.

> 1 Elliott's Debates, pp. 108, 114.

When, therefore, it was proposed to constitute a stronger Federal Government, one of the objects which it was desired to attain was that Congress should have the power to regulate commerce, and the history of the times indicates that, in the minds of those using the phrase, their paramount intention was to vest in Congress alone the regulation of trade in the sense of prescribing rules under which it should be carried on.

The change from the old confederation was effected by the grant of the power "to lay and collect taxes, etc.," in connection with the power "to regulate commerce": yet, so present in the minds of all were the evils of the discriminations existing between the States under the articles of confederation that we find the framers going beyond the grant of the power, so as to restrict Congress from any favoritism in the matter, by prescribing in one clause "but all duties, imposts and excises shall be uniform throughout the United States," and in another (Section 9, Article 6), "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels bound to or from one State be obliged to enter clear or pay duties in another."

The evil of the old system had been that the different States prescribed rules and regulations respecting commere, which were favorable to the citizens of the State prescribing and discriminated against the citizens of others.

The object of the framers of the Constitution was to remove from the States the power of so interfering with commerce, and even to prevent Congress from discriminating in the exercise of such discretion in prescribing rules as was granted to it.

The original draft of a Federal Government (Pinckney's) presented to the Constitutional Convention contained the clause granting the power to Congress "to regulate commerce with all nations, and among the foreign States."

2 Madison's Papers, 740.

See, also,

Pinckney's Draft of a Federal Government.

1 Elliott's Debates, pages 145, 147.

A search of the minutes of the Constitutional Convention, as contained in 1 Elliott's Debates, reveals the following history of the clause relating to the grant of powers to Congress.

On August 18th, 1777, among other amendments proposed to this clause of the Constitution were the following:

That Congress should have the power:

"To grant charters of incorporation in cases where the public good may require them, and the authority of a single State may incompetent."

* * * * * * *

To grant charters of incorporation.

To add to the clause in Pinkney's Draft, "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

* * * * * * *

"To regulate stages on the Post-roads."

See 1 Elliott's Debates, page 247.

On August 22d, 1787, the committee to whom these proposed amendments had been submitted reported favorably on a few of the propositions, not including those above mentioned.

1 Elliott's Debates, page 256.

Again, on September 4th, 1787, the committee reported, adding the words, "and with the Indian Tribes" to the power to regulate commerce, but making no report on the other amendments above mentioned, and this part of the report passed.

1 Elliott's Debates, p. 284.

On September 5th, 1787, the same committee reported on some of the proposed amendments, not including those above mentioned.

1 Elliott's Debates, p. 285.

On September 12th, 1787, the revised Constitution was presented and ordered engrossed.

1 Elliott's Debates, p. 297.

The revised Constitution is contained in 1 Elliott's Debates, page 297, and does not contain the amendments recited above proposed on August 18th, 1787.

This extract from ancient history indicates very clearly what the framers of the Constitution would have thought of any attempt at that time to claim that the grant of the right to regulate commerce meant the grant of the right to engage in commerce, to buy and sell goods and transport passengers, and to incorporate companies for that purpose.

For here, in the very formation of the document, was it proposed to *grant expressly* THE POWERS *now alleged to be implied* so that there could be no doubt about them, *and these proposed amendments received so little favor, that they were never even able to get out of committee with a favorable report.*

History, therefore, shows that the Framers of the Constitution refused to grant the following express powers to Congress, namely:

1. "To grant charters of incorporation."

2. "To grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent."

3. "To regulate stages on the postroads," and yet it is now attempted to be implied that the very men who refused the express grant of power contained in the second clause above quoted at the same time gave an implied power under the wording of another clause which, in order to cover the alleged implied power, must be stretched entirely beyond the ordinary meaning and acceptation of the terms used.

The second proposed amendment above specified would have covered in the clearest manner the power to carry on interstate commerce and to grant charters for the purpose, and would have included *that power* AND NOTHING ELSE. *Yet, although the convention refused to make this express grant, it is claimed that they intended the same grant under the wording of a clause that cannot bear such a construction.*